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No. - .

In the
Supreme Court of the United States.

OCTOBER TERM, 1981.

CITY OF REVERE,
PETITIONER,

v.

MASSACHUSETTS GENERAL HOSPITAL,
RESPONDENT.

Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

IRA H. ZALEZNIK,
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On the Brief:
VALERIE L. PAWSON

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Question Presented.

1. Does a municipality have a constitutional duty, arising under the Eighth Amendment, to pay the medical expenses of a felony suspect injured while being apprehended by the police?

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CITY OF REVERE,
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v.

MASSACHUSETTS GENERAL HOSPITAL,
RESPONDENT.

Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

Introduction.

The City of Revere petitions for a writ of certiorari to review the judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts, entered on April 12, 1982, which declared that the Eighth Amendment to the United States Constitution required the City of Revere to pay the medical expenses of a felony suspect injured while being apprehended by its police force.

Opinion Below.

The opinion of the Supreme Judicial Court, dated April 12, 1982 (Appendix A), is reported at 385 Mass. 772, 434 N.E.2d 185 (1982).

Jurisdiction.

The Supreme Judicial Court issued its opinion on April 12, 1982 and issued its order for judgment to the trial court on the same date (App. 10a). This petition is being filed within ninety days of April 12, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

Constitutional Provision Involved.

The Eighth Amendment to the United States Constitution provides as follows: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Statement of the Case.

Petitioner ("Revere") seeks review of the decision of the Supreme Judicial Court for the Commonwealth of Massachusetts holding Revere liable for the medical expenses of a felony suspect injured during the course of an arrest effected by its police force. Revere's duty to pay these costs, according to

the Supreme Judicial Court, was not a function of a common law rule or statute. Rather, the Supreme Judicial Court held that the Eighth Amendment to the United States Constitution required that Revere be held liable to respondent Massachusetts General Hospital ("MGH").

The pertinent facts are not in dispute: On September 20, 1978, Revere police officers responded to a reported breaking and entering at a dwelling house in Revere. At the scene, they observed one Patrick M. Kivlin ("Kivlin") with a suitcase and a pillowcase and they sought to detain him. Kivlin attempted to flee and, after repeated warnings, and then a warning shot, a police officer shot him. To secure treatment for Kivlin, Revere police summoned an ambulance. The ambulance service took Kivlin to the emergency room at MGH where he was admitted for treatment of his gunshot wound (See App. 1a-2a).

Kivlin underwent treatment at MGH until September 29, 1978. While Kivlin was still confined in the hospital, Revere police secured a warrant for his arrest. Upon Kivlin's release from MGH, Revere police served the warrant and transported him to the local court for an arraignment. The court granted Kivlin a continuance until December 1, 1978, and released him on personal recognizance. Had Kivlin not been released on personal recognizance or had he been unable to raise bail, he would have been sent to the Charles Street House of Correction in the City of Boston or another similar facility outside Revere. Revere has no house of correction or other jail within its city limits or under its control (See App. 2a).

On October 18, 1978, MGH sent its bill for services rendered in the treatment of Kivlin to the Chief of the Revere Police Department. The Chief immediately responded to MGH with a letter denying any responsibility for the expenses. On October 27, 1978, Kivlin returned to MGH for additional treatment, including surgery. Notwithstanding Revere's

denial of liability, MGH admitted Kivlin as a patient. The treatment of Kivlin continued until November 10, 1978, when he was discharged. The record does not reflect that MGH made any effort to collect its fees from Kivlin. Similarly, there was no indication that Kivlin was indigent or otherwise unable to pay the costs of the medical treatment (see App. 2a-3a).

MGH commenced this action against Revere on January 17, 1979, to recover the cost of the medical services rendered to Kivlin. After completion of the pleadings, MGH moved for summary judgment, Mass. R. Civ. P. 56, 368 Mass. 824 (1974), and the motion was referred to a special master for hearing. After hearing, the special master wrote a report to the trial court, recommending that the trial court enter judgment for Revere since, according to the special master, there was no common law, statutory or constitutional basis for a recovery against Revere. The trial judge, after reviewing the report of the special master and the papers on file in the case, agreed with the conclusions of the special master, entered summary judgment for Revere and dismissed MGH's complaint. After the entry of judgment for Revere, MGH duly filed its appeal to the Appeals Court and after entry of the appeal in the Appeals Court, the Supreme Judicial Court transferred the case to its docket on its own motion (see App. 3a).

The Supreme Judicial Court, after hearing, reversed the judgment of the trial court. Although MGH argued that its right to recover was grounded both on state law and constitutional grounds, the Supreme Judicial Court rejected all state law claims.[1] Instead, it held that the Eighth Amendment

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[1] The court likewise eliminated state constitutional grounds as a basis for the judgment for MGH. Noting that the Massachusetts Constitution, Article 26 of the Declaration of Rights, also contains a prohibition against "cruel and unusual punishments," the court refused to consider the application of this provision since MGH did not raise or argue it (App. 5a, n.6).

mandated that Revere be held liable in damages. As the Court stated, 385 Mass. at 774, 434 N.E.2d at 186, App. 3a:

> While there is no contractual basis for recovery, we hold that the constitutional prohibition against cruel and unusual punishment, embodied in the Eighth Amendment to the United States Constitution, requires that Revere be liable to the hospital for the medical services rendered to Kivlin during his first stay at the hospital . . . .

The Supreme Judicial Court relied on *Estelle* v. *Gamble*, 429 U.S. 97 (1976), as the authority for Revere's liability. According to the Supreme Judicial Court, *Estelle's* prohibition against "deliberate indifference" to the medical needs of prisoners created a legal duty on the part of Revere to supply the suspect with "necessary medical care." (App. 7a-8a.) Since Revere was obliged to provide this care, the Court reasoned it was likewise responsible for paying for the treatment rendered.

Revere's contention that *Estelle* was limited to prisoners in a jail facility was flatly rejected by the Supreme Judicial Court. As the court stated, 385 Mass. at 777, 434 N.E.2d at 188, App. 6a, "It is not the fact of incarceration, however, that triggers the protections afforded by the Eighth Amendment. Rather, it is the suspect's loss of freedom when he "cannot by reason of the deprivation of his liberty, care for himself . . . that requires the government to begin to provide medical care." (Citations omitted.) Whether such a constitutional duty exists on the part of a municipality, to fund the costs of this emergency medical treatment, is the issue raised by the Supreme Judicial Court's opinion and is the issue presented to this court by this petition.

Reasons for Granting the Writ.

It is neither unprecedented nor improbable that a criminal suspect such as Kivlin would be injured during the course of an arrest, would require emergency medical treatment from a hospital, and, as a result, would incur medical expenses for which the hospital would seek payment. The Supreme Judicial Court's response to this scenario, however, in holding the municipality liable under the Eighth Amendment for these expenses merely because the injury occurred incident to the proper discharge of duty by its police officers, is extraordinary. In finding the Eighth Amendment to be the basis of this liability, the Supreme Judicial Court ignored important principles enunciated in prior decisions of this court, contradicted opinions from other state supreme courts, and engaged in social engineering that grossly distorts the meaning and purpose of the Eighth Amendment. If permitted to stand, the decision of the Supreme Judicial Court will allow constitutional provisions to be misused as tools for the diversion of public resources that, more often than not, are rapidly shrinking.

This court has repeatedly emphasized that the Eighth Amendment simply does not apply to factual circumstances such as those in this case. *Ingraham* v. *Wright*, 430 U.S. 651, 664 (1977); *Bell* v. *Wolfish*, 441 U.S. 520, 535 (1979). As prior decisions of this court make clear, the historical background of the Eighth Amendment relates to the imposition of criminal sanctions and the desire to prevent excessive or barbarous punishments. See *Gregg* v. *Georgia*, 428 U.S. 153, 168-173 (1976) (joint opinion of Stewart, Powell and Stevens, JJ.); *Furman* v. *Georgia*, 408 U.S. 238, 316-328 (1972) (Marshall, J., concurring). Similarly, judicial interpretations of the Eighth Amendment have been concerned with criminal

punishments by limiting the kind of punishments imposed,[2] proscribing grossly excessive punishments,[3] and by placing substantive limits upon activity that may be made criminal.[4] See *Ingraham*, *supra* at 666-668 and cases cited.

Therefore, if a case falls outside of the criminal process and the imposition of criminal sanctions, the Eighth Amendment prohibition against "cruel and unusual punishments" is inapplicable. As this court stated in *Ingraham*, *supra* at 671-672, n.40:

> Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions. . . . [t]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured formal adjudication of guilt in accordance with due process of law. Where the State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment. (Citations omitted.)

In this case, the Eighth Amendment has no application whatsoever to one in Kivlin's situation who was injured while being apprehended by the police. See also *Bell* v. *Wolfish*, *supra* at 579 (Stevens, J. dissenting). Neither the Commonwealth nor Revere had "secured a formal adjudication of guilt" against Kivlin at the time the medical treatment was

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[2] See *Trop* v. *Dulles*, 356 U.S. 86 (1958) (expatriation for desertion); *Estelle* v. *Gamble*, *supra* (prison officials' imposing "punishment" by deliberate indifference to prisoner's serious medical needs).

[3] See *Weems* v. *United States*, 217 U.S. 349 (1910).

[4] See *Robinson* v. *California*, 370 U.S. 660 (1962).

rendered (App. 2a). Indeed, Kivlin's initial arraignment did not take place until after he was discharged from MGH (see App. 2a). Likewise, Kivlin could in no sense be considered a "prisoner." After his arraignment, he was released on his personal recognizance (see App. 2a). Even if the Commonwealth or Revere had demanded that Kivlin be held in custody pending trial, he would have been sent to the Charles Street Jail in Boston or a similar facility outside Revere, since Revere has no jails within its boundaries and maintains no detention facilities (see App. 2a, n.3). Under these circumstances, Kivlin, while protected by other constitutional guarantees, is simply not eligible to receive Eighth Amendment protection.

Even if the umbrella of Eighth Amendment protection could somehow be broadened to cover one in Kivlin's situation it still would not require Revere to pay the cost of his medical treatment. As previously stated, the Supreme Judicial Court implied a duty to pay on the part of Revere from the rule of *Estelle* v. *Gamble, supra*. Yet the extension of *Estelle's* proscription of "deliberate indifference to serious medical needs of prisoners" to requiring payment for medical treatment only applies in the context of a prison or similar jail facility. As this court stated in *Estelle, supra* at 103, "An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met."

A criminal suspect such as Kivlin, however, is in a different position from a prisoner committed to a correctional facility. Unlike the prisoner who must rely on prison authorities to meet his needs, the suspect has not been stripped of resources, financial and otherwise, with which to pay for necessary medical treatment. To the contrary, Kivlin demonstrated the resources at his disposal by returning to MGH after his arraignment and securing additional treatment, services that the hospital voluntarily administered (see App. 8a).

Revere does not contend that its police officers could deliberately withhold or delay treatment for Kivlin after he was injured. Rather, the police acted properly and responsibly in immediately summoning an ambulance to secure necessary medical attention for Kivlin (see App. 2a). Kivlin's right to receive prompt medical treatment, however, simply cannot be equated with an obligation to pay for this treatment outside the context of a prison with inmates who "cannot by reason of the deprivation of . . . liberty, care for [themselves]." *Estelle, supra* at 104, quoting *Spicer* v. *Williamson*, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926).[5]

Nor could a different result be reached under another constitutional banner. Even if this case were subjected to analysis under the Due Process Clause,[6] Revere could not be held liable to MGH. The Due Process Clause, like the Eighth Amendment, creates a limitation on the exercise of governmental power. This restraint is fundamentally different in character from a provision requiring the allotment and expenditure of public funds. As this court stated in *Harris* v. *McRae*, 448 U.S. 297, 317-318 (1980):

> [T]he liberty protected by the Due Process Clause . . . does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom. To hold otherwise would mark a drastic change in our

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[5] To equate the right to ensure prompt treatment with an obligation to pay for the treatment ultimately rendered would force municipalities to bear the cost of medical expenses in countless situations, including those in which the agents of the city or town act as good samaritans. Cf. *Dade County* v. *Hospital Affiliates International, Inc.*, 378 So.2d 43, 44 (Fla. Dist. Ct. App. 1979).

[6] The Due Process Clause of the Fourteenth Amendment provides, in pertinent part, "No State . . . shall deprive any person of life, liberty, or property, without due process of law . . ."

> understanding of the Constitution. It cannot be that because government may not prohibit the use of contraceptives, or prevent parents from sending their child to a private school, government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private school. To translate the limitation on governmental power implicit in the Due Process Clause into an affirmative funding obligation would require Congress to subsidize the medically necessary abortion of an indigent women even if Congress had not enacted a Medicaid program to subsidize other medically necessary services. Nothing in the Due Process Clause supports such an extraordinary result.

(Citations and footnotes omitted.)[7]

Most state courts, when addressing the problem presented in this case, have resolved it by concluding that there is no municipal liability. For example, in *Trinity Hospital Association* v. *Minot*, 76 N.W.2d 916 (N.D. 1956), the Supreme Court of North Dakota, on facts virtually identical to those in this case, refused to hold the City of Minot liable. After reviewing the pertinent statutes of North Dakota, the court held that the theories of quantum meruit or implied contract could not be applied to the case. As the court stated, 76 N.W.2d at 923, "There is no basis upon which the court can construct a liability."

Similarly, the Supreme Court of Connecticut, in *Windham Community Memorial Hospital* v. *Willimantic*, 166 Conn.

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[7] See also *Maher* v. *Roe*, 432 U.S. 464, 469 (1977): "The Constitution imposes no obligation on the [government] to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents."

113, 348 A.2d 651 (1974), found that a municipality was not liable for the medical expenses of an injured suspect. As the *Windham* Court stated, 166 Conn. at 125-126, 348 A.2d at 658:

> In the present case, the court properly concluded that the summoning of an ambulance by the police officer did not constitute an implied promise that the resulting hospital bill will be paid by the defendant. . . . The further conclusion, properly reached, is that there was no express or implied promise by the defendant city to pay the bill. Finally, the plaintiff has failed to establish that the defendant is liable for the bill and the court was correct in rendering judgment for the defendant.

(See also *King County* v. *Seattle*, 425 P.2d 887, 890 (1967)) (Supreme Court of Washington held that a city was not liable to a county hospital for medical treatment rendered to a suspect injured by city police, since the sheriff's only duty was to deliver the injured party to the hospital for treatment).

Other state courts have ruled that the municipality must be held liable, but the basis of liability in all but one case has been statutory or common law. For example, in *Mt. Carmel Medical Center* v. *Board of County Commissioners of Labette County*, 566 P.2d 384 (Kan. 1977), the Supreme Court of Kansas held that the hospital was entitled to payment from a county based upon Kansas law. As the *Mt. Carmel* court stated, 566 P.2d at 387:

> Both parties agree that in Kansas a sheriff has a duty to furnish medical attention to a prisoner in his custody who is in need thereof, at the county's expense if the prisoner is indigent and no other source of funds is available. This is clearly the law in Kansas.

(See also *Spicer* v. *Williamson*, 191 N.C. 487, 132 S.E. 291 (1926)).

Elsewhere, decisions have been predicated on statutory enactments. Thus, in *City of Tulsa* v. *Sisler*, 285 P.2d 422 (Okla. 1955), municipal liability was based on a statute that expressly required officials to tend to the medical needs of prisoners in custody. See also *Lamar* v. *Board of Comm'rs of Pike County*, 4 Ind. App. 191, 30 N.E. 912 (1892).[8]

Only one other state, Nebraska, has created municipal liability based upon an Eighth Amendment duty. In *Lutheran Medical Center of Omaha* v. *Omaha*, 204 Neb. 292, 281 N.W.2d 786 (1979), the Supreme Court of Nebraska held that the City of Omaha was liable for the cost of medical services provided to both a prisoner in the city jail and a criminal suspect not yet incarcerated. *Lutheran Medical Center*, however, is distinguishable from this case since the City of Omaha operated its own jail facility and the litigants stipulated to the criminal suspect's status as a prisoner in the custody of city police. Even if *Lutheran Medical Center* is not distinguished by reason of the stipulation, it remains, along with the opinion of the Supreme Judicial Court in this case, isolated from the vast majority of decisional law in this area.

Not only is the Supreme Judicial Court's decision a distortion of the Eighth Amendment and in conflict with decisions of courts of last resort in other jurisdictions, but also is a contrived and unnecessary effort, in effect, to legislate results deemed to be in the public interest. The Supreme Judicial Court's opinion in this case was presumably motivated by the laudable intention to secure emergency medical treatment for

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[8]Statutes in other states have provided for emergency treatment without imposing liability on municipalities. For example, in Florida, Fla. Stat. § 401.45 (1977), requires all licensed hospitals to provide emergency treatment to all persons requiring it. Cf. *Dade County* v. *Hospital Affiliates International, Inc.*, *supra* at 46, n.5.

injured persons. As the Court stated, 385 Mass. at 779, 434 N.E.2d at 189, App. 8a, "To ensure Kivlin's right to medical care, Revere must be held liable to the hospital for the medical services it rendered." (See also App. 8a n.10.)

Yet the court's effort, tantamount to legislating social policy, was entirely unnecessary. Through a series of existing legislative enactments, an injured suspect in Massachusetts, like other emergency patients, must be given life-saving medical treatment regardless of financial ability to pay. For example, under Massachusetts law, a patient has the right to receive prompt emergency life-saving treatment without regard to financial status. See Mass. Gen. Laws Ann. c. 111, § 70E K (West 1982). This right is enforceable by the patient through a civil action for malpractice. See Mass. Gen. Laws Ann. c. 111, § 70E (West 1982) and Mass. Gen. Laws Ann. c. 231, § 60B *et seq.* (West 1982).

In addition, a variety of legislative enactments provide for public funding to hospitals to meet the costs of emergency treatment. On the state level, numerous public welfare programs mandate financial assistance to needy persons who require medical care. See Mass. Gen. Laws Ann. c. 118E (West 1982). Similarly, federal programs, such as the Hospital Survey and Construction Act, commonly known as the Hill-Burton Act, provide funding for hospitals such as MGH to ensure medical treatment for indigents. See 42 U.S.C. § 291 et seq.; cf. *Falmouth Hospital* v. *Lopes*, 376 Mass. 580, 382 N.E.2d 1042 (1978).

The Supreme Judicial Court's construction of the Eighth Amendment requires that the Constitution displace these other applicable legislative enactments. In this era of increasing demands for governmental service and shrinking public resources,[9] the allocation of funding ought to be a legislative,

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[9] In November, 1980, Massachusetts voters adopted, under the initiative process of the Massachusetts Constitution, Chapter 580 of the Acts of 1980,

not a judicial function. It seems plain that no judicial intrusion such as that of the Supreme Judicial Court in the instant case can be defended as an appropriate interpretation of the Eighth Amendment.

Conclusion.

The opinion of the Supreme Judicial Court grafted onto the Eighth Amendment limitation on the exercise of the government's power to punish, an affirmative funding obligation on the part of local government. This result conflicts with decisions in other states and distorts the purpose and function of the Eighth Amendment as enunciated in the opinions of this court. If permitted to stand, the Supreme Judicial Court's opinion will increase pressures to create entitlements to public funds resting on the Eighth Amendment and other constitutional provisions. To make clear that the Eighth Amendment permits no such result, this court should grant certiorari to review the decision of the Supreme Judicial Court of the Commonwealth of Massachusetts.

Respectfully submitted,

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entitled "An Act Limiting State and Local Taxation and Expenditures," popularly known as Proposition 2½. Proposition 2½ sets strict limits on the power of municipalities to levy taxes and spend the revenues collected. Cf. *Massachusetts Teachers Association* v. *Secretary of the Commonwealth*, Mass. Adv. Sh. (1981) 1764, 424 N.E. 2d 469.

MASSACHUSETTS GENERAL HOSPITAL vs. CITY OF REVERE.

Suffolk. December 11, 1981. — April 12, 1982.

Present: HENNESSEY, C.J., LIACOS, NOLAN, LYNCH, & O'CONNOR, JJ.

Municipal Corporations, Contracts. *Contract*, With municipality. *Hospital. Police. Arrested Person. Imprisonment. Constitutional Law*, Cruel and unusual punishments.

No statutory or common law basis existed for a municipality to contract with a hospital for the care and treatment of a suspect shot while attempting to evade police. [ ]

A hospital which furnished care and treatment to a suspect shot while attempting to evade municipal police officers was not entitled to recover from the municipality the value of its services on the theory of quantum meruit. [ ]

The prohibition against deliberate indifference to the medical needs of prisoners, contained implicitly in the cruel and unusual punishments clause of the Eighth Amendment to the United States Constitution, established the liability of a municipality to the hospital which furnished care and treatment to a suspect who was shot while trying to evade municipal police officers and who was in their custody at the time of his admission to the hospital. [ ]

CIVIL ACTION commenced in the Boston Municipal Court Department on March 18, 1980.

On removal to the Superior Court Department the case was heard by *Lynch*, J., on a motion for summary judgment.

After review was sought in the Appeals Court the Supreme Judicial Court ordered direct appellate review on its own initiative.

Laurence S. Wolk for Massachusetts General Hospital.

Ira H. Zaleznik for the city of Revere (*Valerie L. Pawson* for the city of Revere and *Carl Valvo*, Assistant Attorney General, for the Commonwealth, with him).

NOLAN, J. On September 20, 1978, city of Revere police responded to a reported breaking and entering in progress.

Upon arrival at the scene, they observed Patrick M. Kivlin with a suitcase and a pillowcase. Kivlin fled and, after repeated warnings to stop and one warning shot, was shot by a police officer. The police summoned an ambulance, which took Kivlin, accompanied by a police officer, to Massachusetts General Hospital (hospital). Kivlin was admitted and remained a patient at the hospital until September 29, 1978.

On September 26, 1978, a warrant issued in the Chelsea Division of the District Court Department for Kivlin's arrest on charges of breaking and entering in the nighttime, larceny, and conspiracy. On September 29, 1978, Kivlin was discharged by the hospital[1] into the custody of the Revere police department and was taken by the police to the Chelsea District Court for a probable cause hearing. The judge granted a continuance to Kivlin[2] and released him on personal recognizance.[3] On October 27, 1978, prior to the probable cause hearing, Kivlin returned to the hospital for treatment, including surgery.[4] He was released on November 10, 1978.[5] A bill for Kivlin's first admission at the hospital was sent to the Revere police department. The chief of police of Revere, responding to the request for payment, stated in a letter to the hospital that Revere had no provision for payment of the bill.

The hospital commenced this action against Revere seeking to recover the full cost of the medical services rendered

[1] During this period, the bill for services rendered to Kivlin at the hospital was $7,948.50.

[2] Probable cause was found at a hearing on December 1, 1978.

[3] The parties stipulated that if the judge had not released Kivlin on personal recognizance and Kivlin had been unable to make bail, he would have been sent by the Chelsea District Court to the "Charles Street House of Correction" or a similar house of correction. See Mass. R. Crim. P. 7 (a) (1), 378 Mass. 855 (1979).

[4] Nowhere in the record is it stated in what circumstances or for what medical problems Kivlin was readmitted to the hospital.

[5] The bill for services rendered to Kivlin at the hospital during this period was $5,360.41.

to Kivlin during both stays at the hospital. Revere answered and filed a third-party complaint against Kivlin and the Commonwealth for reimbursement. The hospital moved for summary judgment, and the case was referred to a special master. Thereafter, upon the master's recommendation, a Superior Court judge denied the hospital's motion for summary judgment, dismissed the complaint and third-party complaint, and entered judgment in favor of Revere. Mass. R. Civ. P. 56 (c), 365 Mass. 824 (1974). The hospital appealed and we transferred the case to this court on our own motion.

The hospital claims, both on contractual and constitutional grounds, that Revere is obligated to pay for the necessary medical services provided to Kivlin. While there is no contractual basis for recovery, we hold that the constitutional prohibition against cruel and unusual punishment, embodied in the Eighth Amendment to the United States Constitution, requires that Revere be liable to the hospital for the medical services rendered to Kivlin during his first stay at the hospital, but not during his second stay.

1. *Contract.* The hospital contends, first, that some kind of implied contract between the hospital and Revere was concluded when the police brought Kivlin to the hospital and he was admitted for treatment. We disagree.

Several prerequisites must be in place before a municipality can be said to have entered into a valid contract. First among these is an underlying authority in the municipality to make the contract. *Lord* v. *Winchester*, 355 Mass. 788, 789 (1969). We have found no basis, either statutory or in common law, that gives to Revere the authority to contract with a hospital for the care and treatment of a suspect shot while attempting to evade police. Municipalities are given the power to contract for health services, G. L. c. 40, § 4, but those contracts may be entered into only by a board of health or a "legally constituted board performing the powers and duties of a board of health." G. L. c. 40, § 4, sixth par., inserted by St. 1965, c. 874, § 3. Here, the hospital sent its bill to the Revere police department, an agency

not performing the powers and duties of a board of health. The hospital, admitting that there are no statutes authorizing its purported contract with Revere, looks hopefully to the common law for authority. There is no such authority. There can be no contract with Revere unless statutory requirements are fulfilled. See *Urban Transp., Inc.* v. *Mayor of Boston*, 373 Mass. 693, 696 (1977); *Richard D. Kimball Co.* v. *Medford*, 340 Mass. 727, 729 (1960).

In addition to the necessity for an underlying authority for a municipality to contract, any contract made on behalf of a city must be made by a duly authorized agent. *Lord* v. *Winchester, supra.* The powers of police officers are delineated in detail in G. L. c. 41, § 98. Nowhere in § 98 is the power to contract given to police. They do not have such power, and are not, therefore, a duly authorized agent of a city to contract.

Furthermore, even if the police had the authority to contract, several statutory requirements for a valid contract were not met. All contracts made by city departments in excess of $2,000 must be in writing and approved by the mayor. G. L. c. 43, § 29. Except in an emergency, a city department could not incur liabilities in excess of its appropriation. G. L. c. 44, § 31. In an emergency, arguably the case here, the city council must approve the expenditure. G. L. c. 44, § 31. "Persons dealing with a municipality must take notice of limitations of this kind upon the contracting power of the municipality and are bound by them and cannot recover upon contracts attempted to be made in violation of them." *Duff* v. *Southbridge*, 325 Mass. 224, 228 (1950), quoting from *Adalian Bros.* v. *Boston*, 323 Mass. 629, 631 (1949). See also *Quincy* v. *Brooks-Skinner, Inc.*, 325 Mass. 406, 413 (1950); *Fluet* v. *McCabe*, 299 Mass. 173, 178 (1938); *Morse* v. *Boston*, 253 Mass. 247, 252 (1925). That the city may have benefited by the hospital's actions is irrelevant to this issue. The statutes are controlling. *Fluet* v. *McCabe, supra.* There is no basis sounding in contract for recovery in this case. See *Windham Community Memorial Hosp.* v. *Willimantic*, 166 Conn. 113

(1974); *Trinity Hosp. Ass'n* v. *Minot*, 76 N.W.2d 916 (N.D. 1956).

The hospital is in no better position on a theory of quantum meruit. Where a contract is illegal by reason of failure to comply with statutory requisites, we will not allow recovery based on quantum meruit. *Lowell* v. *Massachusetts Bonding & Ins. Co.*, 313 Mass. 257, 272 (1943). To do otherwise would, in effect, nullify the statutory scheme with respect to contracts with municipalities. *McGovern* v. *Boston*, 229 Mass. 394, 397-398 (1918). See 15 S.Williston, Contracts § 1786A, at 343-344 (3d ed. 1972). The case of *Long* v. *Athol*, 196 Mass. 497 (1907), is not to the contrary. In *Long* there was a valid contract set aside by the court because of mutual mistake as to the estimate of the amount of work to be done. There the municipality was held liable in quantum meruit for services rendered under what was, at the time the services were rendered, a legal contract. In the instant case no contract was ever executed. Mistake, even if mutual, as to the authority or power of a municipality to contract, is not the type of mistake which will allow recovery in quantum meruit. A good faith rendering of services in such a situation does not warrant violation of the statutory arrangement. *Fluet* v. *McCabe*, *supra* at 178.

2. *Eighth Amendment*. The hospital argues that the prohibition against deliberate indifference to the medical needs of prisoners contained implicitly in the Eighth Amendment[6], *Estelle* v. *Gamble*, 429 U.S. 97 (1976), compels a government agency or division responsible for supplying those medical needs to pay for them.[7] We agree. Kivlin

[6]The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Eighth Amendment has been made applicable to the States by the Fourteenth Amendment. See *Robinson* v. *California*, 370 U.S. 660 (1962). The plaintiff does not invoke the Massachusetts Constitution, though art. 26 of the Declaration of Rights contains a prohibition against the infliction of "cruel or unusual punishments."

[7]We recognize that there may be a question as to the hospital's standing to raise a claim under the Eighth Amendment in this context. No such question was raised or argued in the briefs before us. As such, we deem

was a prisoner in the custody of the Revere police during his first stay in the hospital from September 20 to September 29. We rule that Revere is liable for the expenses of this confinement. Kivlin was not in the custody of the Revere police when he readmitted himself on October 27, however. Accordingly, we find Revere liable only for Kivlin's first confinement.

Revere cites *Estelle* v. *Gamble*, *supra*, for the proposition that a government's obligation to refrain from deliberate indifference to the serious medical needs of a prisoner is limited to those "whom it is punishing by incarceration." *Id.* at 103. Since Kivlin had not been incarcerated when he was brought to the hospital, continues Revere, the rule of *Estelle* v. *Gamble*, *supra*, does not apply. It is not the fact of incarceration, however, that triggers the protections afforded by the Eighth Amendment. Rather, it is the suspect's loss of freedom when he "cannot by reason of the deprivation of his liberty, care for himself," *id.* at 104, quoting from *Spicer* v. *Williamson*, 191 N.C. 487, 490 (1926), that requires the government to begin to provide medical care. Cf. *Dodge City Medical Center* v. *Board of County Comm'rs in Gray County*, 6 Kan.App.2d 731 (1981) (where a suspect is apprehended in the commission of a felony, felled by a police bullet, and taken to a hospital for treatment, he is "in custody" for the purpose of determining the government's liability for his medical expenses while hospitalized, even if he is not formally arrested or kept under guard). See *Lutheran Medical Center of Omaha, Neb.* v. *Omaha*, 204 Neb. 292, 297 (1979); *Ramsey* v. *Ciccone*, 310 F. Supp. 600, 605 (W.D. Mo. 1970).

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the issue waived. Mass. R. A. P. 16 (a) (4), as amended, 367 Mass. 919 (1975).

Furthermore, standing to litigate constitutional issues is sometimes granted to persons asserting the rights of others, especially when it would be difficult for the person whose rights are asserted to litigate them. See C.A. Wright, Law of Federal Courts 50-51 (3d ed. 1976). Cf. *Barrows* v. *Jackson*, 346 U.S. 249 (1953) (party allowed to assert constitutional rights of third persons who, in the future, would find it more difficult to buy property if party not allowed to litigate constitutional issue).

Revere proposes that until September 26, when a warrant for his arrest issued, Kivlin was not under arrest and had, therefore, not lost his freedom so as to bring into play the Eighth Amendment. This argument is specious.

Kivlin was shot by police after repeated warnings to stop, at a time when he was purportedly engaged in committing a felony. Courts have delineated three elements that should be examined in determining when a person is placed under arrest. To constitute an arrest, "'[1] there must be an actual or constructive seizure or detention of the person, [2] performed with the intention to effect an arrest and [3] so understood by the person detained.' . . . '[T]he test must be not what the defendant [. . .] thought, but what a reasonable man, innocent of any crime, would have thought had he been in the defendant's shoes.'"[8] *Hicks* v. *United States*, 382 F.2d 158, 161 (D.C. Cir. 1967), quoting from *Jenkins* v. *United States*, 161 F.2d 99, 101 (10th Cir. 1947), and *United States* v. *McKethan*, 247 F. Supp. 324, 328 (D.D.C. 1965). See also *Commonwealth* v. *Meehan*, 377 Mass. 552, 558-559 (1979), cert. dismissed as improvidently granted, 445 U.S. 39 (1980); *Commonwealth* v. *Avery*, 365 Mass. 59, 65 (1974).

We need not determine at exactly what point the police effectuated an arrest of Kivlin. Certainly at the time the police bullet entered his body he was under arrest. He was intentionally seized by the police at that moment and a reasonable person could only believe that he was then under arrest.

Kivlin was brought to the hospital as a prisoner. Revere had a legal duty to supply him with necessary medical care.[9]

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[8] This test was established in the context of the Fourth and Fifth Amendments to the United States Constitution. The essence of police custody necessary to raise the Eighth Amendment right to be free of cruel and unusual punishment cannot be less stringent than the circumstances necessary to establish custody under the Fourth or Fifth Amendments.

[9] Further, had Kivlin refused the proffered care, he could have been compelled to submit to treatment. *Commissioner of Correction* v. *Myers*, Mass. Adv. Sh. (1979) 2523.

Estelle v. *Gamble*, 429 U.S. 97 (1976). To ensure Kivlin's right to medical care, Revere must be held liable to the hospital for the medical services it rendered. See *Lutheran Medical Center of Omaha, Neb.* v. *Omaha*, *supra*; *Dade County* v. *Hospital Affiliates Int'l, Inc.*, 378 So. 2d 43 (Fla. Dist. Ct. App. 1979) (dictum that government is assumed liable to a hospital which renders medical services to its prisoners). That funds may not have been appropriated for this purpose is no excuse, because inadequate funding will not excuse deprivation of rights guaranteed by the Constitution. *Blaney* v. *Commissioner of Correction*, 374 Mass. 337, 342 n.3 (1978). See *Smith* v. *Sullivan*, 611 F.2d 1039, 1043-1044 (5th Cir. 1980); *Williams* v. *Edwards*, 547 F.2d 1206, 1212-1213 (5th Cir. 1977); *Finney* v. *Arkansas Bd. of Correction*, 505 F.2d 194, 201 (8th Cir. 1974). Further, that such payment may be a violation of State or local law will not avail Revere of any relief from the payment. *Smith* v. *Sullivan*, *supra*.

Reflective of the discussion above, we hold that Revere is liable to the hospital for the stipulated charges incurred for Kivlin's initial stay in the hospital, from September 20, 1978, to September 29, 1978. Entry of summary judgment for Revere with respect to payment for Kivlin's first stay in the hospital was error. On the pleadings and stipulations before us, partial summary judgment should have been entered for the hospital. Mass. R. Civ. P. 56 (a), 365 Mass. 824 (1974).[10]

Kivlin's second stay in the hospital, from October 27, 1978, to November 10, 1978, represents a different situation. The rationale supporting the government's responsibility for the medical needs of its prisoners is that, being in custody, the prisoners cannot provide for these needs themselves. *Estelle* v. *Gamble*, *supra* at 104. "Confinement

[10]The result that we reach under the constitutional banner is entirely consistent with the legislative policy toward prisoners. See G. L. c. 127, § 32 (prisoners are to be treated with "kindness"); G. L. c. 127, § 90A (release of prisoners requiring treatment in medical facilities); G. L. c. 127, § 117A.

strips prisoners of the ability to provide themselves with the basic necessities for living. Thus, the constitution places a duty on prison officials to maintain the well-being of inmates. The duty extends to those needs which the prisoners are unable to provide *because* of their confinement" (emphasis added). *Tunstall* v. *Rowe*, 478 F. Supp. 87, 89 (N.D. Ill. 1979). See *Spicer* v. *Williamson*, *supra* at 490. Once Kivlin was released on personal recognizance, on September 29, he was no longer in the custody of the Revere police or of any other authority. See *Opinion of the Justices*, 201 Mass. 609, 611 (1909) ("the acceptance of bail while a prosecution is pending is a waiver of the right of the State, for the time being, to insist upon the custody of the person of the accused"). That Kivlin was under an obligation to return to court did not place him in the custody of anyone. He was under no greater restriction than one who had been subpoenaed to testify in court as a witness. It was Revere's custody of his body that established his right to medical treatment here. See *Ramsey* v. *Ciccone*, 310 F. Supp. 600 (W.D. Mo. 1970).[11] For this reason, summary judgment was correctly entered for Revere with respect to payment for Kivlin's second stay in the hospital.

The judgment of the Superior Court is affirmed with respect to liability for Kivlin's second stay at the hospital. We reverse that portion of the judgment which concerns Kivlin's first stay at the hospital. The case is remanded to the Superior Court for the entry of judgment against Revere for charges stemming from Kivlin's first admission.

So ordered.

[11] We recognize that a person released on bail or on his own recognizance is considered "in custody" within the meaning of 28 U.S.C. § 2241 (1976), with respect to the jurisdiction of a Federal court to rule on a petition for habeas corpus. *Thames* v. *Justices of the Superior Court*, 383 F. Supp. 41, 43 (D. Mass. 1974). That a person is "in custody" for one purpose does not make him "in custody" for all purposes. The logic of the Eighth Amendment proscription of indifference to serious medical needs of prisoners extends only to those in physical custody.

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,

AT BOSTON, April 12, 1982.

IN THE CASE No. SJC 2579

MASSACHUSETTS GENERAL HOSPITAL

vs.

CITY OF REVERE

pending in the Superior Court Department of the Trial Court for the County of Suffolk No. 40942

ORDERED, that the following entry be made in the docket; viz., —

The judgment of the Superior Court is affirmed with respect to liability for Kivlin's second stay at the hospital. That portion of the judgment which concerns Kivlin's first stay at the hospital is reversed. The case is remanded to the Superior Court for the entry of judgment against Revere for charges stemming from Kivlin's first admission.

BY THE COURT,

Patrick Hurley, CLERK.

April 12, 1982

See opinion on file.

Office - Supreme Court
FILED
NOV 19 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-63.

In the
Supreme Court of the United States.

OCTOBER TERM, 1982.

CITY OF REVERE,

Petitioner,

v.

MASSACHUSETTS GENERAL HOSPITAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

JOINT APPENDIX

ERNEST M. HADDAD,
General Counsel,
MICHAEL BROAD,
Assistant General Counsel,
Massachusetts General Hospital,
55 Fruit Street,
Boston, Massachusetts 02114.
(617) 726-8624

IRA H. ZALEZNIK,
VALERIE L. PAWSON,
LAPPIN, ROSEN, GOLDBERG,
SLAVET, LEVENSON & WERSTEIN,
One Boston Place,
Boston, Massachusetts 02108.
(617) 437-1000

PETITION FOR CERTIORARI FILED JULY 12, 1982
CERTIORARI GRANTED OCTOBER 4, 1982

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Relevant Docket Entries.

Docket Entry No. 40942.

1980	*Filings — Proceedings*
March 26	Rem. from Municipal Court Boston.
	1. Complaint.
	3. Amended Complaint.
	11. ANSWER.
	12. Complaint of Third party 2 Cts.
May 16	20. Motion of plff. for Summary Judgment.
	21. Affidavit of Mass. General Hospital in support of Motion for Summary Judgment (2nd set).
May 23	21A. Aff. of Harold J. Randolph, Admitting Officer of Mass. General Hospital in support of mo. for summary judgment.
	21B. Aff. of Francis X. Sullivan, Director of Patients Accounts at Mass. General Hospital.
August 14	22. Agreed Statement of Facts.
1981	
February 20	23. Recommendation of Special Master re: Motion for summary judgment. Notice sent 2/27/81.
February 27	24. JUDGMENT (SUMMARY) (PURSUANT TO MASS. R. CIV. P. 56): Complaint of plaintiff is dismissed as to defend-

1981	*Filings — Proceedings*
February 27	
continued	ant City of Revere without costs AND: Complaint of 3rd party plaintiff is dismissed as to 3rd party defendants and approved, (Lynch J.), entered on Docket pursuant to Mass. R. Civ. P. 58(a) and notice sent to parties pursuant to Mass. R. Civ. P. 77(d).
March 4	25. Plff's. notice of appeal.
1982	
May 10	26. Rescript from Superior [*sic*] Court. ORDERED: "The judgment of the Superior Court is affirmed with respect to liability for Kivlin's second stay at the hospital. That portion of the judgment which concerns Kivlin's first stay at the hospital is reversed. The case is remanded to the Superior Court for the entry of judgment against Revere for charges stemming from Kivlin's first admission."
June 14	27A. Motion of deft. to stay Judgment, and allowed. (Linscott, J.)

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. MUNICIPAL COURT OF THE CITY OF BOSTON
#470217

MASSACHUSETTS GENERAL HOSPITAL,
PLAINTIFF

vs.

CITY OF REVERE,
DEFENDANT

Complaint.

1. Plaintiff is a duly licensed hospital having a usual place of business at Fruit Street, Boston, County of Suffolk. Defendant is a municipal corporation having a usual place of business at City Hall, Revere, Massachusetts, 02151.

2. Defendant owes plaintiff $13,308.91 for professional services rendered by plaintiff to one Patrick Kivlin, an employee of the defendant, who was injured in the line of duty. Said employee of the defendant was treated at plaintiff's hospital from September 20, 1978 through September 29, 1978.

Wherefore plaintiff demands judgment against defendant for the sum of $13,308.91, interest from September 29, 1978 and costs.

LAURENCE S. WOLK
18 Tremont Street
Boston, MA 02108
523-1790
January 17, 1979

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. MUNICIPAL COURT OF THE CITY OF BOSTON
#470217

MASSACHUSETTS GENERAL HOSPITAL,
PLAINTIFF

vs.

CITY OF REVERE,
DEFENDANT

Amended Complaint as of Course.

The plaintiff, as of course, and in accordance with Rule 15(a) of the Massachusetts Rules of Civil Procedure, amends the complaint in this action so that the same will read as follows:

By striking paragraph 2 from the complaint, and substituting therefor the following:

"Defendant owes plaintiff $13,308.91 for professional services rendered by plaintiff to one Patrick Kivlin, who was in the care and custody of the defendant at the time of his admission to the plaintiff's hospital on September 20, 1978, and who remained a patient at the hospital until September 29, 1978."

This amendment is made as a matter of course in that the answer in the above-entitled action has not yet been served, nor have any motions been filed by the defendant.

LAURENCE S. WOLK
18 Tremont Street
Boston, MA 02108
523-1790
May 16, 1979

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS: BOSTON MUNICIPAL COURT
No: 470217

MASSACHUSETTS GENERAL HOSPITAL
PLAINTIFF

vs.

CITY OF REVERE
DEFENDANT

Defendant's Answer.

1. Defendant admits the allegations contained in paragraph one of the plaintiff's complaint.
2. Defendant denies the allegations contained in paragraph two of the plaintiff's complaint.

First Defense

Plaintiff's complaint fails to state a cause of action upon which relief can be granted.

Second Defense

The defendant states that the plaintiff never had a contract with the City and that if the plaintiff incurred expenses it did so prematurely and at its own risk.

By its attorneys,

LAPPIN, ROSEN, GOLDBERG,
SLAVET, LEVENSON & WEKSTEIN
By_____
VALERIE L. PAWSON
One Boston Place
Boston, MA 02108
Tel: 261-1000

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
#40942

MASSACHUSETTS GENERAL HOSPITAL,
PLAINTIFF

vs.

CITY OF REVERE,
DEFENDANT

Motion for Summary Judgment.

The plaintiff, pursuant to Rule 56 of Massachusetts Rules of Civil Procedure, moves the Court to enter summary judgment for the plaintiff on the ground that there is no genuine issue as to any material fact and that the plaintiff is entitled to judgment as a matter of law.

In support of this motion, the plaintiff refers to the records herein including the complaint, the amendment to the complaint, the answer thereto, and the plaintiff's annexed affidavits.

LAURENCE S. WOLK
18 Tremont Street
Boston, MA 02108
523-1790

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT #40942

MASSACHUSETTS GENERAL HOSPITAL,
PLAINTIFF

vs.

CITY OF REVERE,
DEFENDANT

Affidavit of Massachusetts General Hospital in Support of its Motion for Summary Judgment (Second Set).

1. Massachusetts General Hospital is a legally licensed hospital;

2. I am the Director of Patients' Accounts of the Massachusetts General Hospital. According to the records kept under my control, the patient was admitted to the hospital on September 20, 1978, and discharged on the 29th day of September, 1978. A detailed invoice of the services rendered the patient is attached hereto and marked "A". This bill represents the fair value of the services rendered the patient by the plaintiff, and the rates thereof are set by the Rate Setting Commission of the Commonwealth of Massachusetts.

3. No payment has been made by or on behalf of the patient Patrick Kivlin.

According to the information supplied me by the admitting officer, said patient was under arrest by the Police of the City of Revere at the time he was brought to our hospital. The medical services rendered the patient were necessary, the charges were fair and the services were of an emergency

nature. He was in the custody of the Police of the City of Revere at the time he needed the medical attention.

This affidavit, made in support of the plaintiff's motion for summary judgment, is made under the pains and penalties of perjury this 16th day of May, 1980.

FRANCIS X. SULLIVAN
Director of Patients' Accounts
Massachusetts General Hospital

STATEMENT OF ACCOUNT

MASSACHUSETTS GENERAL HOSPITAL
Boston, Massachusetts 02114 TEL: 726-2154

Final 10/07/78 10/06
Inp.

ROOM NO.	HOSP.	ADMISSION DATE	DISCHARGE DATE
3 0612	03 1	09 20 78	09 29 78

KIVLIN PATRICK MR
CITY OF REVERE
POLICE DEPT
REVERE MA 02151

PATIENT NO. 1334693
PLEASE REFER TO THIS NUMBER ON ALL CORRESPONDENCE OR PAYMENTS.

PAGE 7 9

ADM THRU EW

PLEASE DETACH AND RETURN WITH REMITTANCE

POSTING DATE MONTH	DAY	CHARGE DESCRIPTION		TOTAL CHARGE	INSURANCE COVERAGE	CHARGE TO PATIENT
		SUMMARY OF ROOM AND SERVICE				
		WH 0806 5 days @ 189/day		945.00		945.00
		WH 0612 5 days @ 189/day		945.00		945.00
		SUMMARY OF PMNTS & CHARGES				
		A. OPERATING RM AND SERV	1	805.00		805.00
		B. ANESTHESIA	1	390.00		390.00
		C. RECOVERY RM	1	276.00		276.00
		D. PHARMACY	17	574.80		574.80
		E. RADIOLOGY	5	136.00		136.00
		F. LABORATORY	122	606.50		606.50
		G. MEDICAL, SURGICAL SUPP	4	24.50		24.50
		J. INHALATION THERAPY	1	7.00		7.00
		N. EW AND CLIN FEES	8	168.20		168.20
		S. ROOM AND SERVICE CORR	1	189.00CR		189.00CR
		T. BLOOD LAB.	24	3259.50		3259.50
				7948.50		7948.50

PLEASE PAY LAST AMOUNT THIS COLUMN 7948.50

[Itemized bill deleted.]

STATEMENT OF ACCOUNT

MASSACHUSETTS GENERAL HOSPITAL
Boston, Massachusetts 02114 TEL: 726-2154

Final 11/17/78 11/16
Inp.

ROOM NO.	HOSP.	ADMISSION DATE	DISCHARGE DATE
3 0617	03 2	10 27 78	11 10 78

MR PATRICK KIVLIN
NORTH SHORE RD
REVERE MA 02151

PATIENT NO. 1334693
PLEASE REFER TO THIS NUMBER ON ALL CORRESPONDENCE OR PAYMENTS.

PAGE 3 9

ADM THRU EW

PLEASE DETACH AND RETURN WITH REMITTANCE

POSTING DATE MONTH	DAY	CHARGE DESCRIPTION		TOTAL CHARGE	INSURANCE COVERAGE	CHARGE TO PATIENT
		SUMMARY OF ROOM AND SERVICE				
		WH 0106 1 DAYS @ 189/day		189.00		189.00
		WH 0604 2 days @ 189/day		378.00		378.00
		WH 0610 7 days @ 189/day		1323.00		1323.00
		WH 0617 4 days @ 189/day		756.00		756.00
		SUMMARY OF PMNTS & CHARGES				
		A. OPERATING RM AND SERV	1	1452.00		1452.00
		B. ANESTHESIA	1	644.00		644.00
		C. RECOVERY RM	1	75.00		75.00
		D. PHARMACY	15	324.11		324.11
		E. RADIOLOGY	1	30.00		30.00
		F. LABORATORY	14	117.50		117.50
		G. MEDICAL, SURGICAL SUPP	4	16.80		16.80
		T. BLOOD LAB.	2	55.00		55.00
				5360.41		5360.41

PLEASE PAY LAST AMOUNT THIS COLUMN 5360.41

[Itemized bill deleted.]

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT NO. 40942

MASSACHUSETTS GENERAL HOSPITAL,
PLAINTIFF

vs.

CITY OF REVERE,
DEFENDANT

Affidavit in Support of Motion for Summary Judgment.

1. I am an admitting officer of the Massachusetts General Hospital.

2. In the evening of September 20, 1978, one Patrick M. Kivlin was brought to the hospital in the care and custody of officers of the City of Revere Police Department for emergency treatment resulting from gunshot wounds in the abdomen. I admitted him at that time, was informed by the police of the City of Revere that he was under arrest, and notified the Massachusetts General Hospital Security Department of this fact.

3. After emergency treatment, Patrick M. Kivlin remained as an in-patient at the Massachusetts General Hospital.

This affidavit, made in support of the plaintiff's motion for summary judgment, is made under the pains and penalties of perjury this 1st day of February, 1980.

MASSACHUSETTS GENERAL HOSPITAL
By
HAROLD J. RANDOLPH
Admitting Officer

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT NO. 40942

MASSACHUSETTS GENERAL HOSPITAL,
PLAINTIFF

vs.

CITY OF REVERE,
DEFENDANT

Affidavit in Support of Motion for Summary Judgment.

1. Massachusetts General Hospital is a legally licensed hospital; the patient, Patrick M. Kivlin was admitted to the hospital on September 20, 1978 for gunshot wounds to his abdomen in the emergency department at night under the care and custody of the City of Revere Police Department;

2. I am the director of patients accounts of the Massachusetts General Hospital. According to the records kept under my control, the admission of the aforesaid patient occurred on September 20, 1978 for abdomen gunshot wounds. Patrick M. Kivlin was thereupon admitted as a in-patient, and discharged on November 8, 1978. The charges for his treatment and care were $7,948.50, which represents the fair value of the services rendered him by the plaintiff hospital.

This affidavit, made in support of the plaintiff's motion for summary judgment, is made under the pains and penalties of perjury this 1st day of February, 1980.

MASSACHUSETTS GENERAL HOSPITAL
By
FRANCIS X. SULLIVAN
Director of Patients Accounts

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT NO. 40942

MASSACHUSETTS GENERAL HOSPITAL
PLAINTIFF

vs.

CITY OF REVERE
DEFENDANT

Agreed Statement of Facts.

Now come the Massachusetts General Hospital and the City of Revere and hereby stipulate that the following facts be admitted for the purposes of this action only.

1) On September 20, 1978, officers of the Police Department of the City of Revere responded to 55 Hopkins Street in Revere in response to a reported breaking and entering in progress. Upon arriving at the scene they spotted a man, Patrick M. Kivlin, carrying a suitcase and a pillowcase. Patrick Kivlin attempted to run from the scene and was ordered to halt by police officers. Despite repeated warnings of "stop or I'll shoot" by the police and one warning shot, Kivlin did not halt. Kivlin was then shot by a police officer for the City of Revere.

2) The police summoned the Nordstrum Ambulance Service which arrived and took Patrick M. Kivlin to the Massachusetts General Hospital. One of the police officers for the City of Revere accompanied Kivlin in the ambulance to the Massachusetts General Hospital.

3) Patrick M. Kivlin was admitted to the Massachusetts General Hospital on September 20, 1978. A copy of the admission report is attached hereto and marked Exhibit "A".

4) Patrick M. Kivlin remained a patient at the Massachusetts General Hospital until September 29, 1978.

5) On September 26, 1978 the Chelsea District Court issued a warrant for the arrest for Patrick M. Kivlin on charges of breaking and entering in the night time, larceny, and common law conspiracy.

6) On September 29, 1978, Patrick M. Kivlin was discharged by the Massachusetts General Hospital into the custody of the Revere Police Department who took him from the hospital to the Chelsea District Court for a probable cause hearing. The judge granted a continuance to Kivlin and released him on personal recognizance.

7) The probable cause hearing on Patrick M. Kivlin was held on December 1, 1978 and probable cause was found. Patrick M. Kivlin voluntarily appeared at that hearing.

8) The City of Revere does not have any houses of correction or other jails within the City limits or under City control.

9) If the judge in the Chelsea District Court had not released Patrick Kivlin on personal recognizance and Kivlin had been unable to make bail he would have been sent to the Charles Street House of Correction or other similar house of correction by the Chelsea District Court.

10) On October 18, 1978 P. Kevin Foley, the manager of the Discharged Patients Accounts for Massachusetts General Hospital sent a final in-patient bill to the Chief of the Revere Police Department. A copy of this letter and bill is attached hereto and marked Exhibit "B".

11) On October 19, 1978 the Chief of Police for the City of Revere responded to Mr. Foley's letter that the City of Revere had no provision for payment of the bill. A copy of this letter is attached hereto and marked Exhibit "C".

12) Attached hereto and marked Exhibit "D" is a true and accurate copy of the Revere Rev. Ord. Section 15-3.

By their attorneys,

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Exhibit "A" deleted. See page 9.
Exhibit "B" deleted. See page 10.
Exhibit C and D deleted.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT DEPARTMENT
No. 40942

MASSACHUSETTS GENERAL HOSPITAL,
PLAINTIFF

v.

CITY OF REVERE,
DEFENDANT, AND THIRD PARTY PLAINTIFF

v.

COMMONWEALTH OF MASSACHUSETTS,
THIRD PARTY DEFENDANT

Recommendation of the Special Master.

This matter came on to be heard before me pursuant to an order of the Court appointing me Special Master to hear motions for summary judgment on undisputed facts under Rule 56 of the Massachusetts Rules of Civil Procedure.

After a hearing before me and after a review of the pleadings and other data/material of record on file I conclude, pursuant to Rule 56, that there are no issues of material fact in dispute and that the plaintiff is not entitled to prevail. I conclude pursuant to Rule 56 that the defendant City of Revere is entitled to prevail as a matter of law.

In this action the plaintiff hospital seeks $13,308.91 from the defendant, City of Revere, for services it rendered to a pa-

tient, Patrick M. Kivlin. It is admitted[1] that Revere police officers on September 20, 1978, responded to a reported breaking and entering in progress in their city; that they discovered Mr. Kivlin, with a suitcase and pillowcase, at the scene; that he sought to flee; that repeated warnings of "stop or I'll shoot" were given and that a Revere police officer did shoot Mr. Kivlin. The police summonsed an ambulance service which took Kivlin to the plaintiff hospital. Mr. Kivlin was accompanied by a Revere police officer. Kivlin was a patient at the hospital until September 29, 1978. An arrest warrant was issued in the Chelsea District Court on September 26, 1978. Upon his discharge Kivlin was taken to that Court for a probable cause hearing. The matter was continued and Kivlin released on personal recognizance. The hearing was held on December 1, 1978, and probable cause was found. The City of Revere has no houses of correction or other jails within its limits or in its control.[2] On October 18, 1978, the plaintiff sent a final inpatient bill for $7948.50 to the Chief of the Revere Police Department who on October 19, 1978, responded that the City of Revere had no provision for payment of the bill.[3]

---

[1] Docket File No. 22, Agreed Statement of Facts *filed August 14, 1980*, subsequent to the June 30, 1980, hearing date before the Special Master. But see also undocketed agreed Statement of Facts, dated July 17, 1980, which is identical; see exhibits attached thereto (hospital admission. . . .) See: affidavit of Harold J. Randolph, M.G.H. admitting officer, Undocketed; See also Docket File No. 21, affidavit of Francis X. Sullivan, Director of Patient Accounts.

[2] Had Kivlin not been granted personal recognizance he would have been sent by the Court to the Charles Street, House of Correction or other similar house of correction.

[3] It appears that Kivlin was also re-admitted to the MGH on October 27, 1978, and discharged on Nov. 10, 1978. The $5360.41 is the difference between $13,308.91 and $7948.50. See undocketed Statement of Agreed Facts dated July 17, 1980, and attached exhibits. See also City of Revere legal memorandum, pg. 1.

The plaintiff seeks to recover from the defendant City alleging that the said Kivlin was in the City's "care and custody" at the time of the September 20, 1978, hospital admission and is therefor liable for all of the services rendered in connection with both the September admission and the October admission. See: *Lutheran Medical Center* v. *City of Omaha*, 204 Neb. 292 (1979). I note that in the latter case the defendant city operated its own jail which is not true in the instant case. The plaintiff argues that the arresting authority has a "legal obligation to supply medical services" and should be held liable to pay the hospital which supplied such.

I conclude that under the law of this Commonwealth the City of Revere is not liable for either the initial in patient hospital bill of $7948.50 or the second in patient hospital bill of $5360.41. No evidence exists on this record as to any of the circumstances which surround Mr. Kivlin's re-admission to the hospital in October, 1978. Clearly a City and/or its agents cannot be intentionally indifferent to the medical needs of a prisoner. See: *Estelle* v. *Gamble*, 429 U.S. 97 (1976). But such is not to say that the City of Revere is obligated to provide the funding for such emergency medical services rendered to the suspect, in the absence of a statute or other law granting authority to the City to contract for such or mandating such funding. For a similar fact pattern elsewhere which denied liability see: *Windham Comm. Hosp.* v. *City of Willimantic*, 348 A.2d 651, 656-658 (Conn. 1974). See also: *Trinity Hosp. Assn.* v. *City of Minot*, 76 N.W.2d 916, 923 (N.D. 1956).

No statute or ordinance exists which would authorize the plaintiff, on our record to recover payment for such services. See: G. L. (Ter. Ed.) c. 43, s. 29 which expressly requires that the Mayor of the City *and* the appropriate department head must sign any contract before it is enforceable against the City. The municipal ordinances of the City of Revere expressly prohibit employees of the City from making contracts,

which directly or indirectly, would bind the City. Such contracts are voidable at the election of the City. See: Revere Rev. Ords. s. 2.1. The Chief of Police has no express duty to provide care for prisoners held in the department's custody. See: Revere Rev. Ord. s. 15.3.

Plaintiffs dealing with a municipality are required to take notice of the limitations imposed upon the municipality's contracting power. See: *Morse* v. *Boston*, 253 Mass. 247, 252-3 (1925); *Fluet* v. *McCabe*, 299 Mass. 173, 178 (1938). *Quincy* v. *Brooks-Skinner, Inc.*, 325 Mass. 406, 412-13 (1950). This is true whether the plaintiff's claim is based on an express contract, an implied in fact contract or an implied in law contract. See also: *Adolian Bros. Inc.* v. *Boston*, 323 Mass. 629, 631-2 (1949).

In *Adams* v. *Wiscosset*, 5 Mass. 328, 329 (1809) our Court held the Commonwealth of Massachusetts liable for hospital expenses incurred by a suspect. The opinion was based on St. 1794, c. 48 which imposed such liability on the Commonwealth. The fact that this statute was repealed does not permit us to conclude that now our City is to be liable. Without a statutory enactment expressly covering this issue, it can reasonably be concluded that the General Court either decided, in its collective wisdom, to abolish such liability or that it was best covered by a series of other enactments. See: G.L. (Ter. Ed.) c. 276, s. 58 (transporting prisoners, expenses); G.L. (Ter. Ed.) c. 127, s. 117 (jail physician certifying prisoner needs medical services not available in jail); G.L. (Ter. Ed.) c. 126, s. 29 (Auditor of Boston pays expenses to keep and maintain prisoners who committed crimes in that city).

I further conclude there is no obligation imposed by our constitution or that of the United States Constitution which requires the City to appropriate moneys to pay for such medical services rendered by the plaintiff. Cf. *Harris* v. *McRae*, 48 U.S. L.W. 4941 (1980) (abortion operation funding).

For the foregoing reasons, I recommend that the motion of the plaintiff for summary judgment not be granted. I further recommend that the Court should grant summary judgment for the defendant City of Revere.

Respectfully submitted,

BRIAN T. CALLAHAN
Special Master

Dated: February 12, 1981

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,

AT BOSTON, APRIL 12, 1982.

IN THE CASE No. SJC-2579

MASSACHUSETTS GENERAL HOSPITAL

vs.

CITY OF REVERE

pending in the Superior Court Department of the Trial Court for the County of Suffolk No. 40942

ORDERED, that the following entry be made in the docket; viz., —

The judgment of the Superior Court is affirmed with respect to liability for Kivlin's second stay at the hospital. That portion of the judgment which concerns Kivlin's first stay at the hospital is reversed. The case is remanded to the Superior Court for the entry of judgment against Revere for charges stemming from Kivlin's first admission.

BY THE COURT,

PATRICK J. HURLEY, CLERK.

April 12, 1982.

See opinion on file.

MASSACHUSETTS GENERAL HOSPITAL vs. CITY OF REVERE.

Suffolk. December 11, 1981. — April 12, 1982.

Present: HENNESSEY, C.J., LIACOS, NOLAN, LYNCH, & O'CONNOR, JJ.

Municipal Corporations, Contracts. *Contract*, With municipality. *Hospital. Police. Arrested Person. Imprisonment. Constitutional Law*, Cruel and unusual punishments.

No statutory or common law basis existed for a municipality to contract with a hospital for the care and treatment of a suspect shot while attempting to evade police. [ ]

A hospital which furnished care and treatment to a suspect shot while attempting to evade municipal police officers was not entitled to recover from the municipality the value of its services on the theory of quantum meruit. [ ]

The prohibition against deliberate indifference to the medical needs of prisoners, contained implicitly in the cruel and unusual punishments clause of the Eighth Amendment to the United States Constitution, established the liability of a municipality to the hospital which furnished care and treatment to a suspect who was shot while trying to evade municipal police officers and who was in their custody at the time of his admission to the hospital. [ ]

CIVIL ACTION commenced in the Boston Municipal Court Department on March 18, 1980.

On removal to the Superior Court Department the case was heard by *Lynch*, J., on a motion for summary judgment.

After review was sought in the Appeals Court the Supreme Judicial Court ordered direct appellate review on its own initiative.

Laurence S. Wolk for Massachusetts General Hospital.

Ira H. Zaleznik for the city of Revere (*Valerie L. Pawson* for the city of Revere and *Carl Valvo*, Assistant Attorney General, for the Commonwealth, with him).

NOLAN, J. On September 20, 1978, city of Revere police responded to a reported breaking and entering in progress.

Upon arrival at the scene, they observed Patrick M. Kivlin with a suitcase and a pillowcase. Kivlin fled and, after repeated warnings to stop and one warning shot, was shot by a police officer. The police summoned an ambulance, which took Kivlin, accompanied by a police officer, to Massachusetts General Hospital (hospital). Kivlin was admitted and remained a patient at the hospital until September 29, 1978.

On September 26, 1978, a warrant issued in the Chelsea Division of the District Court Department for Kivlin's arrest on charges of breaking and entering in the nighttime, larceny, and conspiracy. On September 29, 1978, Kivlin was discharged by the hospital[1] into the custody of the Revere police department and was taken by the police to the Chelsea District Court for a probable cause hearing. The judge granted a continuance to Kivlin[2] and released him on personal recognizance.[3] On October 27, 1978, prior to the probable cause hearing, Kivlin returned to the hospital for treatment, including surgery.[4] He was released on November 10, 1978.[5] A bill for Kivlin's first admission at the hospital was sent to the Revere police department. The chief of police of Revere, responding to the request for payment, stated in a letter to the hospital that Revere had no provision for payment of the bill.

The hospital commenced this action against Revere seeking to recover the full cost of the medical services rendered

[1] During this period, the bill for services rendered to Kivlin at the hospital was $7,948.50.

[2] Probable cause was found at a hearing on December 1, 1978.

[3] The parties stipulated that if the judge had not released Kivlin on personal recognizance and Kivlin had been unable to make bail, he would have been sent by the Chelsea District Court to the "Charles Street House of Correction" or a similar house of correction. See Mass. R. Crim. P. 7 (a) (1), 378 Mass. 855 (1979).

[4] Nowhere in the record is it stated in what circumstances or for what medical problems Kivlin was readmitted to the hospital.

[5] The bill for services rendered to Kivlin at the hospital during this period was $5,380.41.

to Kivlin during both stays at the hospital. Revere answered and filed a third-party complaint against Kivlin and the Commonwealth for reimbursement. The hospital moved for summary judgment, and the case was referred to a special master. Thereafter, upon the master's recommendation, a Superior Court judge denied the hospital's motion for summary judgment, dismissed the complaint and third-party complaint, and entered judgment in favor of Revere. Mass. R. Civ. P. 56 (c), 365 Mass. 824 (1974). The hospital appealed, and we transferred the case to this court on our own motion.

The hospital claims, both on contractual and constitutional grounds, that Revere is obligated to pay for the necessary medical services provided to Kivlin. While there is no contractual basis for recovery, we hold that the constitutional prohibition against cruel and unusual punishment, embodied in the Eighth Amendment to the United States Constitution, requires that Revere be liable to the hospital for the medical services rendered to Kivlin during his first stay at the hospital, but not during his second stay.

1. *Contract.* The hospital contends, first, that some kind of implied contract between the hospital and Revere was concluded when the police brought Kivlin to the hospital and he was admitted for treatment. We disagree.

Several prerequisites must be in place before a municipality can be said to have entered into a valid contract. First among these is an underlying authority in the municipality to make the contract. *Lord* v. *Winchester*, 355 Mass. 788, 789 (1969). We have found no basis, either statutory or in common law, that gives to Revere the authority to contract with a hospital for the care and treatment of a suspect shot while attempting to evade police. Municipalities are given the power to contract for health services, G. L. c. 40, § 4, but those contracts may be entered into only by a board of health or a "legally constituted board performing the powers and duties of a board of health." G. L. c. 40, § 4, sixth par., inserted by St. 1965, c. 874, § 3. Here, the hospital sent its bill to the Revere police department, an agency

not performing the powers and duties of a board of health. The hospital, admitting that there are no statutes authorizing its purported contract with Revere, looks hopefully to the common law for authority. There is no such authority. There can be no contract with Revere unless statutory requirements are fulfilled. See *Urban Transp., Inc.* v. *Mayor of Boston*, 373 Mass. 693, 696 (1977); *Richard D. Kimball Co.* v. *Medford*, 340 Mass. 727, 729 (1960).

In addition to the necessity for an underlying authority for a municipality to contract, any contract made on behalf of a city must be made by a duly authorized agent. *Lord* v. *Winchester, supra*. The powers of police officers are delineated in detail in G. L. c. 41, § 98. Nowhere in § 98 is the power to contract given to police. They do not have such power, and are not, therefore, a duly authorized agent of a city to contract.

Furthermore, even if the police had the authority to contract, several statutory requirements for a valid contract were not met. All contracts made by city departments in excess of $2,000 must be in writing and approved by the mayor. G. L. c. 43, § 29. Except in an emergency, a city department could not incur liabilities in excess of its appropriation. G. L. c. 44, § 31. In an emergency, arguably the case here, the city council must approve the expenditure. G. L. c. 44, § 31. "Persons dealing with a municipality must take notice of limitations of this kind upon the contracting power of the municipality and are bound by them and cannot recover upon contracts attempted to be made in violation of them." *Duff* v. *Southbridge*, 325 Mass. 224, 228 (1950), quoting from *Adalian Bros.* v. *Boston*, 323 Mass. 629, 631 (1949). See also *Quincy* v. *Brooks-Skinner, Inc.*, 325 Mass. 406, 413 (1950); *Fluet* v. *McCabe*, 299 Mass. 173, 178 (1938); *Morse* v. *Boston*, 253 Mass. 247, 252 (1925). That the city may have benefited by the hospital's actions is irrelevant to this issue. The statutes are controlling. *Fluet* v. *McCabe, supra*. There is no basis sounding in contract for recovery in this case. See *Windham Community Memorial Hosp.* v. *Willimantic*, 166 Conn. 113

(1974); *Trinity Hosp. Ass'n* v. *Minot*, 76 N.W.2d 916 (N.D. 1956).

The hospital is in no better position on a theory of quantum meruit. Where a contract is illegal by reason of failure to comply with statutory requisites, we will not allow recovery based on quantum meruit. *Lowell* v. *Massachusetts Bonding & Ins. Co.*, 313 Mass. 257, 272 (1943). To do otherwise would, in effect, nullify the statutory scheme with respect to contracts with municipalities. *McGovern* v. *Boston*, 229 Mass. 394, 397-398 (1918). See 15 S.Williston, Contracts § 1786A, at 343-344 (3d ed. 1972). The case of *Long* v. *Athol*, 196 Mass. 497 (1907), is not to the contrary. In *Long* there was a valid contract set aside by the court because of mutual mistake as to the estimate of the amount of work to be done. There the municipality was held liable in quantum meruit for services rendered under what was, at the time the services were rendered, a legal contract. In the instant case no contract was ever executed. Mistake, even if mutual, as to the authority or power of a municipality to contract, is not the type of mistake which will allow recovery in quantum meruit. A good faith rendering of services in such a situation does not warrant violation of the statutory arrangement. *Fluet* v. *McCabe*, *supra* at 178.

2. *Eighth Amendment.* The hospital argues that the prohibition against deliberate indifference to the medical needs of prisoners contained implicitly in the Eighth Amendment[6], *Estelle* v. *Gamble*, 429 U.S. 97 (1976), compels a government agency or division responsible for supplying those medical needs to pay for them.[7] We agree. Kivlin

[6]The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Eighth Amendment has been made applicable to the States by the Fourteenth Amendment. See *Robinson* v. *California*, 370 U.S. 660 (1962). The plaintiff does not invoke the Massachusetts Constitution, though art. 26 of the Declaration of Rights contains a prohibition against the infliction of "cruel or unusual punishments."

[7]We recognize that there may be a question as to the hospital's standing to raise a claim under the Eighth Amendment in this context. No such question was raised or argued in the briefs before us. As such, we deem

was a prisoner in the custody of the Revere police during his first stay in the hospital from September 20 to September 29. We rule that Revere is liable for the expenses of this confinement. Kivlin was not in the custody of the Revere police when he readmitted himself on October 27, however. Accordingly, we find Revere liable only for Kivlin's first confinement.

Revere cites *Estelle* v. *Gamble, supra*, for the proposition that a government's obligation to refrain from deliberate indifference to the serious medical needs of a prisoner is limited to those "whom it is punishing by incarceration." *Id.* at 103. Since Kivlin had not been incarcerated when he was brought to the hospital, continues Revere, the rule of *Estelle* v. *Gamble, supra*, does not apply. It is not the fact of incarceration, however, that triggers the protections afforded by the Eighth Amendment. Rather, it is the suspect's loss of freedom when he "cannot by reason of the deprivation of his liberty, care for himself," *id.* at 104, quoting from *Spicer* v. *Williamson*, 191 N.C. 487, 490 (1926), that requires the government to begin to provide medical care. Cf. *Dodge City Medical Center* v. *Board of County Comm'rs in Gray County*, 6 Kan.App.2d 731 (1981) (where a suspect is apprehended in the commission of a felony, felled by a police bullet, and taken to a hospital for treatment, he is "in custody" for the purpose of determining the government's liability for his medical expenses while hospitalized, even if he is not formally arrested or kept under guard). See *Lutheran Medical Center of Omaha, Neb.* v. *Omaha*, 204 Neb. 292, 297 (1979); *Ramsey* v. *Ciccone*, 310 F. Supp. 600, 605 (W.D. Mo. 1970).

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the issue waived. Mass. R. A. P. 16 (a) (4), as amended, 367 Mass. 919 (1975).

Furthermore, standing to litigate constitutional issues is sometimes granted to persons asserting the rights of others, especially when it would be difficult for the person whose rights are asserted to litigate them. See C.A. Wright, Law of Federal Courts 50-51 (3d ed. 1976). Cf. *Barrows* v. *Jackson*, 346 U.S. 249 (1953) (party allowed to assert constitutional rights of third persons who, in the future, would find it more difficult to buy property if party not allowed to litigate constitutional issue).

Revere proposes that until September 26, when a warrant for his arrest issued, Kivlin was not under arrest and had, therefore, not lost his freedom so as to bring into play the Eighth Amendment. This argument is specious.

Kivlin was shot by police after repeated warnings to stop, at a time when he was purportedly engaged in committing a felony. Courts have delineated three elements that should be examined in determining when a person is placed under arrest. To constitute an arrest, "'[1] there must be an actual or constructive seizure or detention of the person, [2] performed with the intention to effect an arrest and [3] so understood by the person detained.' . . . '[T]he test must be not what the defendant [. . .] thought, but what a reasonable man, innocent of any crime, would have thought had he been in the defendant's shoes.'"[8] *Hicks* v. *United States*, 382 F.2d 158, 161 (D.C. Cir. 1967), quoting from *Jenkins* v. *United States*, 113 F.2d 99, 101 (10th Cir. 1947), and *United States* v. *McKeehan*, 247 F. Supp. 324, 328 (D.D.C. 1965). See also *Commonwealth* v. *Meehan*, 377 Mass. 552, 558-559 (1979), cert. dismissed as improvidently granted, 445 U.S. 39 (1980); *Commonwealth* v. *Avery*, 365 Mass. 59, 65 (1974).

We need not determine at exactly what point the police effectuated an arrest of Kivlin. Certainly at the time the police bullet entered his body he was under arrest. He was intentionally seized by the police at that moment and a reasonable person could only believe that he was then under arrest.

Kivlin was brought to the hospital as a prisoner. Revere had a legal duty to supply him with necessary medical care.[9]

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[8]This test was established in the context of the Fourth and Fifth Amendments to the United States Constitution. The essence of police custody necessary to raise the Eighth Amendment right to be free of cruel and unusual punishment cannot be less stringent than the circumstances necessary to establish custody under the Fourth or Fifth Amendments.

[9]Further, had Kivlin refused the proffered care, he could have been compelled to submit to treatment. *Commissioner of Correction* v. *Myers*, Mass. Adv. Sh. (1979) 2523.

Estelle v. *Gamble*, 429 U.S. 97 (1976). To ensure Kivlin's right to medical care, Revere must be held liable to the hospital for the medical services it rendered. See *Lutheran Medical Center of Omaha, Neb.* v. *Omaha*, *supra*; *Dade County* v. *Hospital Affiliates Int'l, Inc.*, 378 So. 2d 43 (Fla. Dist. Ct. App. 1979) (dictum that government is assumed liable to a hospital which renders medical services to its prisoners). That funds may not have been appropriated for this purpose is no excuse, because inadequate funding will not excuse deprivation of rights guaranteed by the Constitution. *Blaney* v. *Commissioner of Correction*, 374 Mass. 337, 342 n.3 (1978). See *Smith* v. *Sullivan*, 611 F.2d 1039, 1043-1044 (5th Cir. 1980); *Williams* v. *Edwards*, 547 F.2d 1206, 1212-1213 (5th Cir. 1977); *Finney* v. *Arkansas Bd. of Correction*, 505 F.2d 194, 201 (8th Cir. 1974). Further, that such payment may be a violation of State or local law will not avail Revere of any relief from the payment. *Smith* v. *Sullivan*, *supra*.

Reflective of the discussion above, we hold that Revere is liable to the hospital for the stipulated charges incurred for Kivlin's initial stay in the hospital, from September 20, 1978, to September 29, 1978. Entry of summary judgment for Revere with respect to payment for Kivlin's first stay in the hospital was error. On the pleadings and stipulations before us, partial summary judgment should have been entered for the hospital. Mass. R. Civ. P. 56 (a), 365 Mass. 824 (1974).[10]

Kivlin's second stay in the hospital, from October 27, 1978, to November 10, 1978, represents a different situation. The rationale supporting the government's responsibility for the medical needs of its prisoners is that, being in custody, the prisoners cannot provide for these needs themselves. *Estelle* v. *Gamble*, *supra* at 104. "Confinement

[10] The result that we reach under the constitutional banner is entirely consistent with the legislative policy toward prisoners. See G. L. c. 127, § 32 (prisoners are to be treated with "kindness"); G. L. c. 127, § 90A (release of prisoners requiring treatment in medical facilities); G. L. c. 127, § 117A.

strips prisoners of the ability to provide themselves with the basic necessities for living. Thus, the constitution places a duty on prison officials to maintain the well-being of inmates. The duty extends to those needs which the prisoners are unable to provide *because* of their confinement" (emphasis added). *Tunstall* v. *Rowe*, 478 F. Supp. 87, 89 (N.D. Ill. 1979). See *Spicer* v. *Williamson*, *supra* at 490. Once Kivlin was released on personal recognizance, on September 29, he was no longer in the custody of the Revere police or of any other authority. See *Opinion of the Justices*, 201 Mass. 609, 611 (1909) ("the acceptance of bail while a prosecution is pending is a waiver of the right of the State, for the time being, to insist upon the custody of the person of the accused"). That Kivlin was under an obligation to return to court did not place him in the custody of anyone. He was under no greater restriction than one who had been subpoenaed to testify in court as a witness. It was Revere's custody of his body that established his right to medical treatment here. See *Ramsey* v. *Ciccone*, 310 F. Supp. 600 (W.D. Mo. 1970).[11] For this reason, summary judgment was correctly entered for Revere with respect to payment for Kivlin's second stay in the hospital.

The judgment of the Superior Court is affirmed with respect to liability for Kivlin's second stay at the hospital. We reverse that portion of the judgment which concerns Kivlin's first stay at the hospital. The case is remanded to the Superior Court for the entry of judgment against Revere for charges stemming from Kivlin's first admission.

So ordered.

[11] We recognize that a person released on bail or on his own recognizance is considered "in custody" within the meaning of 28 U.S.C. § 2241 (1976), with respect to the jurisdiction of a Federal court to rule on a petition for habeas corpus. *Thames* v. *Justices of the Superior Court*, 383 F. Supp. 41, 43 (D. Mass. 1974). That a person is "in custody" for one purpose does not make him "in custody" for all purposes. The logic of the Eighth Amendment proscription of indifference to serious medical needs of prisoners extends only to those in physical custody.

Office - Supreme Court, U.S.
FILED
AUG 20 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-63

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

CITY OF REVERE,

Petitioner,

v.

MASSACHUSETTS GENERAL HOSPITAL,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Judical Court for the Commonwealth of Massachusetts

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BRIEF IN OPPOSITION

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No. 82-63

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

CITY OF REVERE,

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MASSACHUSETTS GENERAL HOSPITAL,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Judical Court for the Commonwealth of Massachusetts

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BRIEF IN OPPOSITION

QUESTION PRESENTED

Is a municipality which, in the course of arresting a suspected criminal, injures and immobilizes him and thereafter brings him to a hospital for necessary medical care liable to the hospital for the costs of that care?

SUMMARY OF PROCEEDINGS

This collection case was initiated by the Massachusetts General Hospital ("MGH") against the City of Revere ("Revere") in Boston Municipal Court on March 18, 1980. The matter was removed to the state superior court which entered summary judgment for Revere. The Supreme Judical Court reversed in part, and judgment was entered accordingly for MGH. Revere now petitions this Court for a Writ of Certiorari.

STATEMENT OF FACTS

On September 20, 1978, Revere police officers attempted to detain a man suspected of breaking and entering. When the man, Patrick Kivlin, refused to stop, the police shot him.

The police called an ambulance which took Kivlin, accompanied by one of the police officers, to MGH. Kivlin was admitted and remained in the hospital for ten days, after which he was discharged into the custody of the Revere police department.

MGH subsequently billed the Revere police department for the treatment provided to Kivlin.[1/] When Revere refused payment, MGH brought this action.

1/ Charges for Kivlin's hospitalization on a later occasion when he returned to MGH on his own unescorted by the police are not in issue here.

ARGUMENT

The government must provide needed medical care to convicted persons. "[I]t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself." Estelle v. Gamble, 429 U.S. 97, 104 (1976), quoting from Spicer v. Williamson, 191 N.C. 487, 490 132 S.E. 219, 293 (1926). It would be anomolous indeed if unconvicted prisoners had fewer rights and if the government had fewer obligations with respect to them. See Lutheran Medical Center v. Omaha, 204 Neb. 292, 295, 281 N.W.2d 786 (1979); Ramsey v. Ciccone, 310 F. Supp. 600, 604 (W.D. Mo. 1970).

Revere argued to the Supreme Judicial Court that "Kivlin had never been deprived of his liberty." (Supreme Judicial Court Brief, p.20). This

argument was not accepted by the court.

As the Supreme Judicial Court observed, Kivlin was clearly under arrest at the time he was shot. The police had acted to detain him with the obvious intention of arresting him; no reasonable person could have misunderstood. 385 Mass. 772, 772.[2/] The policeman who escorted Kivlin by ambulance to MGH announced to the hospital admitting officer that Kivlin was under arrest. See Appendix hereto.

In sum, "[h]ad he not been injured there is no question but that pursuant to duty the [police] would have taken him to jail and not to the hospital." Dodge City Medical Center v. Board of County Commissioners, 6 Kan. App. 2d 731, 732, 634 P.2d 163, 165 (1981). The "odds

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2/ The opinion of the Supreme Judicial Court is reprinted in the Petition.

against his 'escape' from the hospital were long." Id. at 733. Indeed, as the Supreme Judicial Court noted, when Kivlin was ready to leave MGH, he "was discharged by the hospital into the custody of the Revere police department." 385 Mass at 773.

The Supreme Judicial Court found Kivlin had a right to receive necessary medical care and Revere was obliged to pay for the care in order to insure that this right to treatment was effectuated. The Supreme Judicial Court grounded the right to treatment in the Eighth Amendment. 385 Mass. at 776.

In its petition to this Court, Revere now cites for the first time Ingraham v. Wright, 430 U.S. 651 (1977), and Bell v. Wolfish, 441 U.S. 520 (1979).[3/] Even if

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3/ Because these cases were not previously raised by Revere, they are not cited by the Supreme Judicial Court in its decision.

those decisions had been presented to the trial judge and had been considered by him and by the Supreme Judicial Court, however, the ultimate result -- the judgment against Revere for medical expenses -- would likely have been the same.

First, this Court has already recognized that unconvicted prisoners also have rights under the Constitution. Bell v. Wolfish, supra at 545; see Ingraham v. Wright, supra at 672 and n.40. Whether grounded in the Eighth Amendment or in the Due Process Clause of the Fourteenth Amendment, the rights of a suspect in custody (and still presumed innocent) are at least as great as those of a prisoner already adjudicated guilty, and the corresponding governmental obligations are also at least as great.

Bell v. Wolfish, supra at 545.[4] The rationale relied on by the Supreme Judicial Court -- the prisoner's inability to care for himself -- applies with equal force.[5] 385 Mass. at 777, 780 n.11.

Second, while the Supreme Judicial Court did not base its conclusion on the

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4/ See Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977) (medical treatment for serious disease or injury required by Due Process Clause); Newman v. Alabama, 503 F.2d 1320, 1330 (5th Cir. 1974), cert. denied 421 U.S. 948 (1975) (Due Process Clause is "equally satisfactory constitutional repository" of these rights and obligations); Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 688 (D. Mass. 1973), aff'd 494 F.2d 1196 (1st. Cir.), cert. denied sub nom Hall v. Inmates of Suffolk County Jail, 419 U.S. 977 (1974).

5/ Indeed, the Supreme Judicial Court would have extended the rule of Commissioner of Correction v. Myers, Mass. Adv. Sch. (1979) 2523, 399 N.E.2d 452 to allow the government to compel even an unconvicted prisoner to submit to treatment over his objection. 385 Mass. at 778 n.9.

Massachusetts Constitution, the court expressly noted that Art. 26 of the Declaration of Rights of the state Constitution also contains the prohibition against the infliction of "cruel and unusual punishments." 385 Mass. at 776 n.6. It would obviously be open to the state court to undertake the same analysis and reach the same result as a matter of state law without presenting any federal question for review by this Court.6/

Finally, Revere's reliance on Harris v. McRae, 448 U.S. 297 (1980), is fundamentally misplaced. That case held

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6/ Even assuming arguendo that this Court were inclined to reverse and remand based on decisions Revere never cited in the state courts, it is reasonable to expect that MGH would be permitted to amend its pleadings to raise expressly the due process and state constitutional claims.

that although the government could not prohibit abortions in certain cases, it was not obliged to pay for them through Medicaid. The difference, of course, is that the state clearly had no affirmative duty to provide the abortions -- merely the obligation not to interfere with a woman's right to arrange an abortion for herself.

Here, by contrast, Revere had already restricted Kivlin's ability to obtain his own necessary care by immobilizing (shooting) him and taking him into custody. As a result, Revere did have the affirmative obligation to provide that care. Estelle v. Gamble, supra. The Supreme Judicial Court did not tell Revere how that care was to be provided; it merely held that when Revere engaged

the services of MGH to do so, Revere became responsible for the resulting charges.7/

7/ Revere tries to buttress its argument by citing the Massachusetts "patient's rights" act, Mass. Gen. Laws c. 111, §70E(k). This law was not enacted until the year after Kivlin's hospitalization and thus does not apply. See St. 1979, c. 214. Finally, Revere comments that the Hill-Burton Act, 42 U.S.C. §§291 et seq., provides funding "for hospitals such as MGH," apparently intending to imply that MGH could have or perhaps even did receive payment from the federal government for this service. This issue was not raised below, so MGH had no opportunity to present contrary evidence on this point. In any case, these statutes obviously do not override Kivlin's rights or Revere's obligations under the Constitution. Revere's attempt to shift the burden of payment to other governmental entities is curious in light of its failure to appeal the dismissal of its third-party complaint against the Commonwealth of Massachusetts for reimbursement.

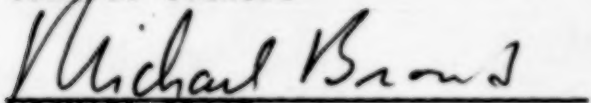
CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

Massachusetts General Hospital

ERNEST M. HADDAD
General Counsel



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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

SUPERIOR COURT

NO. 40642

MASSACHUSETTS GENERAL HOSPITAL
Plaintiff

vs.

CITY OF REVERE,
Defendants

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

1. I am an admitting officer of the Massachusetts General Hospital.

2. In the evening of September 20, 1970, one Patrick M. Kivlin was brought to the hospital in the care and custody of officers of the City of Revere Police Department for emergency treatment resulting from gunshot wounds in the abdomen. I admitted him at that time, was informed by the police of the City of Revere that he was under arrest, and notified the Massachusetts General Hospital Security Department of this fact.

3. After emergency treatment, Patrick M. Kivlin remained as an in-patient at the Massachusetts General Hospital.

This affidavit, made in support of the plaintiff's motion for summary judgment, is made under the pains and penalties of perjury this 1st day of February, 1980.

Massachusetts General Hospital
By

Harold J. Randolph
Admitting Officer

Office-Supreme Court, U.S.
FILED
AUG 19 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-63.

In the Supreme Court of the United States.

OCTOBER TERM, 1982.

CITY OF REVERE,
PETITIONER,

v.

MASSACHUSETTS GENERAL HOSPITAL,
RESPONDENT.

Brief of Amicus Curiae City of Boston in Support of Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

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Questions Presented.

The question set forth in the Petition for Certiorari is as follows:

Does a municipality have a constitutional duty, arising under the Eighth Amendment, to pay the medical expenses of a felony suspect injured while being apprehended by the police?

The subsidiary questions fairly subsumed by that question are:

1. Does the Eighth Amendment to the United States Constitution govern treatment of criminal suspects during police custody, prior to any conviction?

2. Does the United States Constitution's guarantee that those in official custody receive needed medical care require that payment for such care be supplied by the arresting jurisdiction itself, rather than by the health care provider?

3. Does a hospital which has provided emergency medical care to a person in police custody have standing to raise that person's constitutional right to receive needed medical care when:

(a) the hospital's only claimed injury lies in the arresting jurisdiction's refusal to provide reimbursement for the medical care provided; and

(b) there is no apparent threat to the rights of those in police custody to receive needed medical care?

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No. 82-63.

In the
Supreme Court of the United States.

OCTOBER TERM, 1982.

CITY OF REVERE,
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v.

MASSACHUSETTS GENERAL HOSPITAL,
RESPONDENT.

Brief of Amicus Curiae City of Boston in Support of Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

Interest of the Amicus Curiae.

The decision below threatens the City of Boston[1] and other cities in the Commonwealth of Massachusetts with new and significant financial liabilities. Criminal suspects in police custody, prior to arraignment, frequently require medical

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[1] This brief is sponsored by the authorized law officer of Boston, a political subdivision of the Commonwealth of Massachusetts. Accordingly, no consent to the filing of this brief is necessary. Supreme Court Rule 36.4.

care, whether as the result of a fight, a driving accident, serious intoxication, an injury inflicted by the police in the course of arrest, or some other cause. Proper police practice requires that needed medical care be provided to such persons. Hospitals with emergency facilities are often the nearest and most appropriate sources of such care. In the past, when Boston police have called on hospitals to provide care to people in police custody, Boston has not paid for the medical services provided. Indeed Boston, like cities in the Commonwealth generally, has no appropriation set aside or intended for such expenses. Propelled by law and custom alike, hospitals have provided such services as needed regardless of whether payment has been assured. As a result of the decision below, however, it is predictable that hospitals will submit bills for such services on a regular basis and, if such bills are not paid voluntarily, will bring suit to compel payment by the municipality involved. Indeed, in the several months that have elapsed since the decision below, Boston has received a substantial bill for services, and another suit has been filed by Massachusetts General Hospital (MGH) against the City of Chelsea to recover payment for medical services provided to a fugitive from Rhode Island shot by a Rhode Island trooper. *Massachusetts General Hospital* v. *City of Chelsea*, Boston Municipal Court docket No. 20810.

The decision below also puts pressure on Boston to modify its practices with respect to medical care in ways that may, ironically, *reduce* the quality of care provided to those in police custody. A requirement that every city pay, upon request, for services provided by hospitals, yields an incentive to develop rules directing the police to use municipal or other publicly controlled hospitals to the extent feasible, since such hospitals will presumably not request payment from the city for their services. Those in need of medical care may, as a result, be deprived of the opportunity to be treated at the nearest or otherwise most appropriate medical facility.

The decision below poses other, less obvious, threats. It rests on the novel and radical proposition that, because the federal Constitution provides those in custody some right to needed medical care, the courts should intervene to make the policy decision as to *who should pay for that care*. No question was posed in this case as to the substantive right to care. The police did everything appropriate to ensure that the suspect Kivlin received care by calling an ambulance and having him delivered to MGH. MGH in turn provided appropriate care, undeterred by the absence of any principal or practice that would require the City of Revere to pay for such care. There is no reason to believe that police and hospitals in Massachusetts will not generally continue to act in precisely the same way in the future, regardless of whether cities are required to pay for the services provided. See p. 9 and note 12 *infra*. The court below evidently concluded, on some unarticulated basis, that it was more appropriate as a policy matter for cities than for hospitals to pay for services provided to indigent criminal suspects in circumstances such as those in this case. However this funding issue should be resolved, it seems clear that the relevant considerations have nothing whatever to do with the concerns embodied in the Eighth Amendment's prohibition against cruel and unusual punishment, or in the related prohibition of the Due Process Clause of the Fourteenth Amendment. The decision below thus stands as an open invitation to state and federal courts to invoke the United States Constitution in support of their preferred solutions to a wide variety of funding and other policy problems that bear no more than a peripheral relationship to substantive constitutional mandates.

Accordingly, Boston submits this brief in support of the Petition for Certiorari herein.

Statement of the Case.

Amicus relies on the Statement of the Case set forth in the Petition, but wishes to emphasize in addition the following facts.

The decision below rests on the proposition that cities have an Eighth Amendment duty not only to ensure needed medical care for those in police custody, but to reimburse the principal provider for such care.

The decision would apply regardless of the *reason* that care is needed. Thus, the court below made no finding that the injury requiring treatment was the result of police misconduct — nor would the evidence in this record have supported any such finding.[2] Nor, indeed, did the court below even rely on the fact that the police *caused* the injury: the decision's rationale would be no less applicable had the suspect injured himself or been injured by a third party.

The decision below found no basis in state law for requiring Revere to pay the medical expenses at issue. Indeed the court found that Massachusetts law *prohibited* finding an express or implied contract for Revere to pay for the services rendered under the circumstances of this case, as well as for recovery on any *quantum meruit* theory. The decision herein relied solely on the Eighth Amendment as the source of the novel duty of a city to pay for medical services provided free of charge by a hospital.

The state's highest court was on entirely new ground, unsupported by any precedent in this Court or elsewhere, in holding that the federal Constitution required Revere not

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[2] Under certain circumstances, Massachusetts law authorizes the use of deadly force to effect an arrest. *See Commonwealth* v. *Klein*, 372 Mass. 823, 363 N.E.2d 1313 (1977); *Julian* v. *Randazzo*, Mass. Adv. Sh. (1980) 965, 403 N.E.2d 931 (1980). There is no suggestion in this case that those circumstances were not satisfied or that the conduct of the police was in any other respect unlawful or improper.

simply to ensure that those in police custody received needed medical services, but, in addition, to pay the hospital for providing those services. The court's only rationale for this novel constitutional theory is contained in one wholly conclusory, 20-word passage; "To ensure Kivlin's right to medical care, Revere must be held liable to the hospital for the medical services rendered." 385 Mass. 772, 779, 434 N.E.2d 185, 189 (1982).

Absolutely nothing in the opinion below or in the record of this case supports the notion that a criminal suspect's right to medical care would in any way be endangered by a decision that entities other than Revere should continue to be responsible for funding such care, or that the reallocation of fiscal responsibilities decreed by the court below would serve in any degree to better ensure the availability or quality of medical care in situations like these.

Reasons for Granting the Writ.

I. The Supreme Judicial Court's Holding That the Eighth Amendment Governs Conditions of Police Custody Prior to Conviction is in Conflict With This Court's Decisions.

The court below held that the Eighth Amendment defined Revere's obligations to provide medical care to those in the custody of its police. The court looked to *Estelle* v. *Gamble*[3] as establishing the appropriate standard, quoting *Estelle's* command that government refrain from "deliberate indifference to serious medical needs of prisoners."[4]

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[3] 429 U.S. 97 (1976).

[4] *Id.* at 104. *See Massachusetts General Hospital* v. *Revere*, 385 Mass. 772, at 777, 434 N.E.2d 185, at 188 (1982).

That holding conflicts squarely with several recent decisions of this Court, which have made clear that the rights of persons in official custody prior to criminal conviction, or in a non-criminal context, are governed *not* by the Eighth Amendment, but by the Due Process Clause of the Fifth and the Fourteenth Amendments.[5]

The distinction this Court has drawn is one of substance, designed to secure rights and obligations in the post-conviction context distinct in kind from those applicable in other custodial situations. Thus, after conviction, the Eighth Amendment operates to limit the *kind* of punishment that can be imposed, preventing the infliction of penalties that cannot be

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[5] *Ingraham* v. *Wright*, 430 U.S. 651 (1977), held the Eighth Amendment inapplicable to corporal punishment in schools on the ground that the Amendment was designed solely to limit *criminal* punishment: "the State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law." *Id.* at 671 n.40. The Court ruled that it was the Due Process Clause of the Fourteenth Amendment that established the limits on punishment where there had been no such adjudication. *Id.* In *Bell* v. *Wolfish*, 441 U.S. 520, 535 & n.16 (1979), the Court held that due process, rather than the Eighth Amendment, governs conditions of confinement for pretrial detainees. And in *Youngberg* v. *Romeo*, 102 S.Ct. 2452 (1982), the Court held that due process, rather than the Eighth Amendment, governs conditions of confinement for mentally retarded persons who have been civilly committed.

Several federal courts of appeals have likewise held that it is due process, rather than the Eighth Amendment, that guarantees pretrial detainees the right to needed medical care. See *Norris* v. *Frame*, 585 F.2d 1183 (3d Cir. 1978); *Loe* v. *Armistead*, 582 F.2d 1291 (4th Cir. 1978), *cert. den. sub nom. Moffitt* v. *Loe*, 446 U.S. 928 (1980). *See also Duran* v. *Elrod*, 542 F.2d 998 (7th Cir. 1976) (due process rather than Eighth Amendment governs general conditions of custody of pretrial detainees); *Fitzke* v. *Shappell*, 468 F.2d 1072, 1076 (6th Cir. 1972) (substantive due process governs pretrial detainees' rights to medical care; no discussion of Eighth Amendment's applicability). *Contra*, *Fielder* v. *Bosshard*, 590 F.2d 105 (5th Cir. 1979) (applying Eighth Amendment analysis to pretrial detention, without considering substantive due process).

justified as serving legitimate penological purposes.[6] Where there has been no conviction, criminal punishment is not authorized *at all*, so the Eighth Amendment's ban on "cruel and unusual" punishments is simply inapplicable. Instead, substantive due process operates to protect the "liberty" interests of those in official custody, and requires that custodial conditions be justified by legitimate state goals that the custody in question is designed to serve. Punishment, whether humane or cruel, could not constitute such a goal.[7]

Although this Court has established these basic principles, it has only begun to hint at what they may imply for the constitutionality of specific conditions of confinement in various custodial contexts. Inevitably, the task of drawing out these implications will, at least in the first instance, be left primarily to state courts and to the lower federal judiciary. It is, therefore, essential that the courts understand the distinction in principle. No court should be allowed to assume, as did the court below, that standards established in Eighth Amendment cases such as *Estelle* v. *Gamble* can simply be transposed unthinkingly to all custodial situations.

Rights to medical care may well be different, and more extensive, when no criminal conviction exists to justify the custody at issue. Thus, in *Youngberg* v. *Romeo*,[8] this Court found that mentally retarded persons who had been civilly committed enjoy rights to affirmative treatment and services going beyond any rights that could be justified in the name of the Eighth Amendment's ban on "deliberate indifference." The Court held in *Youngberg* that the district court in that case had erred in applying the *Estelle* standard,[9] and held,

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[6] *Estelle* v. *Gamble*, 429 U.S. 97, 103 (1976).

[7] *Bell* v. *Wolfish*, 441 U.S. at 535 & n.16.

[8] 102 S.Ct. 2452 (1982).

[9] *Id.* at 2456 n.11; 2460.

further, that substantive due process required the state to provide, in addition to adequate medical care, such training as professionals would consider reasonable in order to ensure safety and facilitate freedom from needless bodily restraints.[10]

The Court should grant certiorari in order to clarify the important differences in principle between the conditions of confinement that are constitutionally authorized in situations of police custody, and those authorized for post-conviction incarceration. Alternatively, the Court may wish to consider summary disposition, remanding for reconsideration in light of the precedents so plainly ignored by the court below.

II. The Supreme Judicial Court's Novel and Insupportable Theory That the United States Constitution Requires an Arresting Jurisdiction Not Only to Ensure That Those Within Police Custody Receive Needed Medical Care, but Also to Pay for Such Care, Raises Issues of Federalism and Separation of Powers Calling for Resolution by This Court.

In finding that the federal Constitution required that Revere itself pay for medical care needed by and provided to those in police custody, the court below took an important — and an unwarranted — step beyond previous definitions of the duty to ensure needed medical care.

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[10] *Id.* For federal courts of appeals decisions indicating that substantive due process may provide for a different and more extensive right to medical care in the pretrial detention situation, see *Norris* v. *Frame*, *supra*, 585 F.2d at 1186-88 (involving right to continue methadone treatment); *Duran* v. *Elrod*, *supra* (substantive due process provides more stringent standard for pretrial detainee conditions than Eighth Amendment does for post-conviction conditions); *Loe* v. *Armistead*, *supra* (finding substantive due process "at least as co-extensive as the guarantees of the eighth amendment," in a case defining pretrial detainees' right to medical care).

There is no issue in this case as to the *substantive right to receive care*. The police acted promptly to ensure that Kivlin receive appropriate treatment, and MGH provided it without question or delay, both before and after the City of Revere refused to pay the hospital's bill.[11] There is every reason to believe that future suspects in police custody will continue to be treated this way, regardless of who pays the bill. A combination of laws, constitutional and common law doctrines, and official regulations and policies governing the police and hospitals, provide extensive assurances that those in police custody will receive needed medical care.[12]

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[11] Although the court below asserted that holding Revere liable to MGH was necessary "to ensure Kivlin's right to medical care," 385 Mass. at 779, 434 N.E.2d at 189, the record leaves no doubt that this right was fully protected by what the police and MGH did as soon as Kivlin was injured. Moreover, despite Revere's refusal to pay MGH for the emergency service it had rendered to Kivlin, the record shows that MGH later admitted him for additional treatment, valued at $5,300.41. 385 Mass. at 773 n.5, 434 N.E.2d at 186 n.5.

[12] For example, the Boston Police Rules and Regulations clearly contemplate that the police will obtain appropriate treatment for a person injured in the course of arrest. Thus, Rule No. 203, "Handling Accident Victims and Emergency Medical Assistance" (June 4, 1979), requires a policeman to wait for an ambulance rather than transport a victim to the hospital himself, and specifies that "[p]ersons taken into custody by the police, who require emergency medical treatment, should be transported in accordance with this rule." Rule No. 318, "Prisoners Amended" (Jan. 1982), requires that, when a prisoner is assisted to a hospital, a memorandum of any search shall be made (§ 14); that, when a prisoner is unconscious for any cause, the officer in charge shall endeavor to restore consciousness and summon medical assistance (§ 16); that any unusual appearance shall receive immediate attention (*id.*); and that a female prisoner needing immediate medical attention shall be taken to a hospital rather than the House of Detention after being booked (§ 37).

Federal courts have recently made it clear that the Due Process Clause of the Fourteenth Amendment imposes a duty to provide medical care to persons confined prior to trial. See note 5 *supra*. See also *Hughes* v. *Noble*, 295 F.2d 495 (5th Cir. 1961); *Coleman* v. *Johnston*, 247 F.2d 273 (7th Cir. 1957);

Nor is there any issue in this case as to whether an arrested suspect has a right to receive needed care *free of charge*. Kivlin

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Green v. *Cauthen*, 379 F. Supp. 361, 369 (D. S.C. 1974); *Mullins* v. *City of River Rouge*, 338 F. Supp. 26 (E.D. Mich. 1972). *See generally* Comment, the Rights of Prisoners to Medical Care and the Implications for Drug-Dependent Prisoners and Pre-trial Detainees, 42 U. Chi. L. Rev. 705 (1975). Police are presumably subject to this duty from the time someone enters into their custody. For cases dealing specifically with police custody in an on-the-street situation, *see, e.g.*, *Lutheran Medical Center* v. *City of Omaha*, 204 Neb. 292, 281 N.W.2d 786 (1979) (federal constitutional duty to provide medical care to suspect shot during arrest); *White* v. *Rochford*, 592 F.2d 381, 383 (7th Cir. 1979) (stating, in dictum, that police denial of needed medical care to someone in custody would violate substantive due process, and holding that police have an affirmative duty to lend aid to innocent bystanders "endangered by the performance of official duty").

Further, all hospitals in Massachusetts with a certified emergency unit are required by statute to provide services to all requiring them, without discrimination on account of source of payment or economic status. Mass. Gen. Laws Ann. c. 111 § 70E(k) (West 1982). Hospitals refusing to provide treatment would be subject by statute to malpractice liability. Mass. Gen. Laws Ann. c. 111, § 70E and c. 231, § 60B-E (West 1982). In other states, the courts have developed common law doctrines imposing comparable obligations on hospitals with emergency facilities. *See, e.g.*, *Guerrero* v. *Copper Queen Hospital*, 112 Ariz. 104, 537 P.2d 1329 (1975); *Wilmington General Hospital* v. *Manlove*, 54 Del. 235, 174 A.2d 135 (1961); *Mercy Medical Center of Oshkosh, Inc.* v. *Winnebago County*, 58 Wis. 2d 260, 206 N.W.2d 198 (1973). And the literature indicates that the courts now generally recognize a duty to provide emergency care without regard to ability to pay (or any other factor besides need for care). *See, e.g.*, Dougherty & Dougherty, Moral Reconstruction in the Hospital: A Legal and Philosophical Perspective on Patient Rights, 14 *Creighton L. Rev.* 1409, 1410-11 (1981); Ficarra, The Hospital Emergency Room and the Law, 12 *Cal. W. L. Rev.* 223, 236 (1976); G. Annas, *The Rights of Hospital Patients* 37 (1975); Powers, Hospital Emergency Service and the Open Door, 66 *Mich. L. Rev.* 1455, 1462-63, 1485-86 (1968).

Moreover, general public welfare provisions provide for financial assistance for needy persons requiring medical care. See Mass. Gen. Laws Ann. c. 118E (West 1982). And federal regulations prescribe that hospitals that have received grants under the Hill-Burton Act, c. 958, § 601 et seq., 60 Stat. 1041 (1946), codified at 42 U.S.C. § 291 (1976), must supply a reasonable amount of free care to indigents for at least 20 years, 42 U.S.C. § 291c(e), 42 C.F.R. § 124.503(a). Hospitals that received or will receive

has received such care. MGH's suit was solely against the City of Revere; Revere's third-party complaint against Kivlin was dismissed by the trial judge when he dismissed MGH's complaint and entered judgment for Revere.[13]

The sole issue is whether Revere should be responsible for reimbursing MGH for the treatment provided. In resolving this issue, the court below sailed into a realm of policy making having nothing at all to do with the interests that the federal Constitution was designed to protect.

In a recent Florida decision, an appellate court rejected a lower court's attempt similarly to allocate responsibility for payment in order to achieve certain policy objectives.[14] There the police had arranged transportation to the hospital for two men who had injured each other in a knife fight. The lower court held the county liable to the hospital for the treatment provided. The appellate court reversed, finding that, since the men had not been in police custody, state law imposed on the county no obligation to pay. In language quite applicable to the decisions below, the appeals court ruled that the lower court's decision was an inappropriate way to further its presumed policy objectives:

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aid under Title XVI of the Public Health Service Act must provide such care indefinitely. 42 U.S.C. 300o-3(b)(1)(J). Furthermore, any hospital assisted by either program is required to make *emergency* care available to all, regardless of ability to pay. 42 C.F.R. § 124.603(b)(1). In addition, the standards promulgated by the Joint Commission on Accreditation of Hospitals, published in the Accreditation Manual for Hospitals, provide that:

> Any individual who comes to the hospital for emergency medical evaluation or initial treatment shall be properly assessed by qualified individuals and appropriate services shall be rendered within the defined capability of the hospital.

[13] 385 Mass. at 774; 434 N.E.2d at 186.

[14] *Dade County* v. *Hospital Affiliates International, Inc.*, 378 So.2d 43 (Fla. Dist. Ct. App. 1979).

> The lower court's conclusion was apparently based on the "public policy" that hospitals should be encouraged to treat emergency patients. But, it is for the legislature, and not the courts, to devise the means by which that end, however desirable, should be achieved. 10 Fla. Jur.2d Constitutional Law § 147 (1979). In Sec. 401.45, Fla.Stat. (1977), the legislature has required licensed hospitals like the appellee to provide treatment to all persons who require it on an emergency basis. Moreover, such facilities may be required to respond in damages if they fail to discharge that duty. See, e.g., *Hunt* v. *Palm Springs General Hospital, Inc.*, 352 So.2d 582 (Fla. 3d D.C.A. 1977). Even if mere humanitarian considerations were not enough, these very practical factors provide sufficient motivation for a hospital to admit needy persons who require its care. It was therefore unnecessary and improper to attempt to encourage this result by requiring the taxpayers, rather than the appellee itself, to discharge this obligation by extending the county's responsibility beyond that imposed by Sec. 951.23.

378 S.2d at 46 n.5.

The decision below takes a step beyond any federal or state court precedent known to *amicus*. This Court, certainly, has never indicated that the duty to provide needed medical care includes anything more than a duty to ensure that such care is in fact provided. The underlying rationale for the constitutional duty, set forth in *Estelle* v. *Gamble*,[15] is that if the state deprives a person of the ability to care for himself, then it must provide needed care so as to avoid subjecting him to pointless suffering.[16] This rationale leaves open the question of whether

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[15] 429 U.S. 97 (1976).

[16] *Id.* at 103.

the state has any duty to pay for care in a situation in which care will in any event be provided, either because the individual has access to resources, or because health care providers recognize an obligation to provide treatment free of charge to the individual — treatment for which the providers may be reimbursed pursuant to various state and federal health and welfare programs. However this Court might resolve the question of payment *as between the state and the individual in custody* in different situations,[17] there seems no basis for using the federal Constitution to allocate responsibility *as between the state and the providers of health care.*

The only cases known to *amicus* that have dealt with the issue in this case — whether health care providers have a right to reimbursement by the state — have treated it as a question of state policy, to be resolved by looking to state legislation and common law doctrines. No court has found, as did the court below, that the federal Constitution mandates payment by the state regardless of state law and policy to the contrary.

Some courts have denied health care providers any right to reimbursement, relying on the absence of statutes authorizing payment.[18] Courts that have found a right to reimbursement

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[17] The complexity of this question demonstrates that it should not be resolved implicitly — without careful consideration of the issues. Thus, vis-a-vis the individual, the state's obligation to pay might well depend on such factors as whether it has deprived the individual of the opportunity to earn a living; whether the medical treatment is truly needed or is optional; whether the need results from state action or from the individual's own actions; and who, if anyone, is at fault.

[18] *Windham Community Memorial Hospital* v. *City of Willimantic*, 166 Conn. 113, 348 A.2d 651 (1974) (city had no obligation to pay for treatment provided to person injured during arrest, because city had no statutory authority to contract for such treatment); *Trinity Hosp. Assoc.* v. *City of Minot*, 76 N.W.2d 916 (N.D. 1956) (same); *King County* v. *City of Seattle*, 70 Wash. 2d 988, 425 P.2d 887 (1967) (*en banc*) (no statute or court rule imposed any duty on sheriff beyond delivering city prisoners to hospital).

have relied on state law apparently authorizing payment and/or on the existence of a contract, actual or implied, between the health care provider and the state for the services rendered.[19] The question of whether the state has a duty to provide needed medical care is often determinative of the state law contract issue because, under the general common law rule, an implied contract will be found where the person requesting services for a third party has a legal obligation to provide such services.[20] Some courts have found such a duty in state law,[21] and one court other than that below, in the Eighth Amendment.[22] Even in that one case, however, the court relied on the Eighth Amendment simply as establishing the duty to provide care; it relied solely on state law to create an implied contract to pay for services sought out pursuant to that duty. Other courts have made clear that the duty to ensure that medical care is obtained does not necessarily mean that, as a matter of state law, an obligation to pay will also be im-

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[19] *Lamar* v. *Board of Commissioners of Pike Cty.*, 4 Ind. App. 191, 30 N.E. 912 (1892); *Miller* v. *County of Dickinson*, 68 Iowa 102, 26 N.W. 31 (1885); *Dodge City Medical Center* v. *Board of County Commissioners in Gray County*, 6 Kan. App. 2d 731, 634 P.2d 163 (1982); *Mt. Carmel Medical Center* v. *Board of County Commissioners of Labette County*, 1 Kan. App. 2d 374, 566 P.2d 384 (1977); *Lutheran Medical Center* v. *City of Omaha*, 204 Neb. 292, 294-95, 281 N.W. 2d 786, 788 (1979); *Spicer* v. *Williamson*, 191 N.C. 487, 132 S.E. 291 (1926); *Hospital Services, Inc.* v. *Dumas*, 297 N.W.2d 320 (N.D. 1980); *City of Tulsa* v. *Sisler*, 285 P.2d 422 (Okla. 1955).

[20] *Lutheran Medical Center* v. *City of Omaha*, 204 Neb. 292, 295, 281 N.W.2d 786, 788 (1979), citing *Spicer* v. *Williamson*, 191 N.C. 487, 132 S.E. 291 (1926).

[21] *Lamar* v. *Board of Commissioners of Pike Cty.*, *supra* n.19; *Miller* v. *County of Dickinson*, *supra* n.19; *Mt. Carmel Medical Center* v. *Board of County Commissioners of Labette County*, *supra* n.19; *Spicer* v. *Williamson*, *supra* n.19; *City of Tulsa* v. *Sisler*, *supra* n.19; *Dodge City Medical Center* v. *Board of County Commissioners in Gray County*, *supra* n.19.

[22] *See Lutheran Medical Center* v. *City of Omaha*, *supra* n.19; see also *Dade County* v. *Hospital Affiliates, International, Inc.*, *supra* n.14 (dictum).

plied.[23] The Supreme Judicial Court, having found that state law rules out any kind of contract under the circumstances of this case, stands alone in finding that the federal Constitution's guarantee of medical care itself includes a state or municipal duty to pay for such care vis-a-vis the health care provider.

State legislatures have traditionally chosen among a variety of approaches to the problem of ensuring needed health care to those in custody, and to the problem of paying for medical services provided to the indigent. Thus Massachusetts legislation once provided for payment by cities for services in circumstances like those in this case;[24] was later amended to provide for payment by the Commonwealth;[25] and was then repealed[26] when the Legislature enacted comprehensive public welfare provisions which included medical care in their coverage.[27] The federal government and the various states have at various times developed many different programs to provide reimbursement for hospitals such as MGH, when they provide care free of charge to indigents.

The holding below would constitutionalize all such decisions, forcing courts to decide, as a matter of federal constitutional law, who should pay in a wide variety of situations. This Court either should grant certiorari to clarify the line between constitutional adjudication and legislative policy mak-

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[23] Thus, in *King County* v. *City of Seattle*, *supra* n.18, the court held that, although the sheriff had a duty to ensure that city prisoners were provided with needed medical care, including hospitalization if appropriate, there was *no* duty to reimburse the county hospital, which had a statutory obligation to admit free of charge patients who could not pay for treatment.

[24] Mass. Gen. Laws Ann. c. 117, § 24A (West 1969), as added by Stat. 1959, c. 584.

[25] Stat. 1967, c. 658, § 22, amending Mass. Gen. Laws Ann. c. 117, § 24A (West 1969).

[26] Stat. 1975, c. 618, § 4.

[27] *See* Mass. Gen. Laws Ann. c. 118E, § 6 (West Supp. 1982).

ing in this context, or should summarily reverse to indicate that this case is so clearly on the wrong side of that line as to require no extended debate.

III. The Supreme Judicial Court's Decision that MGH Had Standing to Assert the Federal Constitutional Rights of Arrested Persons to Medical Care Represents an Altogether Inappropriate Resolution of an Important and Recurring Question of Federal Law.

Although indicating that the City of Revere might have waived its right to question the standing of MGH, the court below went on to suggest that MGH in fact had standing to litigate the suspect's Eighth Amendment claim inasmuch as "standing to litigate constitutional issues is sometimes granted to persons asserting the rights of others, especially when it would be difficult for the person whose rights are asserted to litigate them."[28]

This case is a classic misapplication of that standard. Far from *protecting* the rights to medical care of criminal suspects who could not readily assert such rights themselves, the third-

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[28] Because the court below effectively resolved the standing question, citing *Barrows* v. *Jackson*, 346 U.S. 249 (1953), the issue is properly before this Court. Moreover, review here on the standing issue is appropriate because the views of the court below on standing could well have been influenced by the court's erroneous conception of the underlying substantive constitutional right, discussed in part II, *supra*. That issue is indisputably before this Court. Finally, MGH will presumably renew *in this Court* its claim on behalf of the suspect's constitutional rights. If principles of Article III jurisprudence, including the prudential limits on the assertion of third-party standing in Article III courts, establish that MGH has no standing in a federal court to make such claims on the suspect's behalf, then not even the alleged waiver below could explain a decision by this Court to overlook the clear obstacles to the standing MGH asserts.

party intervention by MGH may *endanger* those very rights — by grounding them in an ill-fitting constitutional source,[29] and by providing an incentive for cities to direct their police to use only publicly controlled hospitals, in order to avoid the sort of liability for which MGH argues here.

The right to medical care that MGH was permitted to champion in its quest for payment was, indeed, not even *jeopardized* by the situation MGH sought to "correct": no suspect in police custody, so far as the record in this case reveals, had been, or *would ever be*, denied needed medical care in Massachusetts because of any hospital's concern for bill collection. Just as Kivlin, the suspect in this case, received from MGH all the medical care he required,[30] so others in his situation stand assured of similar treatment by a combination of laws and regulations governing both police and health-care providers, public and private, in this setting.[31]

Providing nothing beyond a convenient vehicle for MGH (and the state's highest court) to ride in shifting the costs of care to taxpayers, the suspect was more used than served by this derivative assertion of his supposed rights. It is difficult to imagine a more apt illustration of the reasons litigants are not ordinarily awarded standing to complain that others, who have not chosen to sue, are being denied their rights.[32]

Although the plurality opinion in *Singleton* v. *Wulff*[33] found that physicians had standing to assert the rights of women to receive abortions with Medicaid funding, that opinion relied

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[29] *See* Part I *supra*.

[30] *See* note 11 *supra*.

[31] *See* note 12 *supra*.

[32] *See* Stewart, The Reformation of American Administrative Law, 88 *Harv. L. Rev.* 1667, 1732-33, 1736 (1975).

[33] 428 U.S. 106 (1976).

on the fact that the women's rights were in fact threatened.[34] Moreover, Justice Stevens, whose concurrence was necessary to the result in *Singleton*, relied on the fact that the physicians were asserting their own constitutional rights as well as those of third parties.[35] In this case, MGH relies entirely on the constitutional rights of others.

Thus Justice Powell may have been correct in fearing that *Singleton* would send a misleading message, apparently permitting "a court to reach unnecessarily to decide a difficult constitutional issue in a case in which nothing more is at stake than remuneration for professional services."[36]

The Court should act to erase the egregious standing error of the court below, and to correct any misimpression that may have been created by its decision in *Singleton*.

Conclusion.

For the foregoing reasons, the City of Boston urges this Court either to grant certiorari or to reverse the judgment below summarily.

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[34] *Id.* at 117 (Blackmun, J., joined by Brennan, White, and Marshall, JJ.) (noting that indigent women cannot easily get abortions without their physicians being paid by the State and, therefore, that the right to receive an abortion was necessarily at stake).

[35] *Id.* at 121-22 (Stevens, J., concurring in part).

[36] *Id.* at 129 (Powell, J., dissenting).

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No. 82-63.

In the
Supreme Court of the United States.

OCTOBER TERM, 1982.

CITY OF REVERE,
PETITIONER,

v.

MASSACHUSETTS GENERAL HOSPITAL,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Brief for Petitioner.

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Question Presented.

Does a municipality have a constitutional duty, arising under the Eighth or Fourteenth Amendments, to pay the medical expenses of a felony suspect injured while being apprehended by the police?

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Brief for Petitioner.

Opinion Below.

The opinion of the Supreme Judicial Court, dated April 12, 1982, is reported at 385 Mass. 772, 434 N.E.2d 185 (1982), and appears in the joint appendix (hereafter "A.") at 22-30.

Jurisdiction.

The Supreme Judicial Court issued its opinion on April 12, 1982 and issued its order for judgment to the trial court on the same date (A. 21). This Court granted certiorari on October 4, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3).

Constitutional Provisions Involved.

The Eighth Amendment to the United States Constitution provides as follows: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Due Process Clause of the Fourteenth Amendment provides, in pertinent part: "No State . . . shall deprive any person of life, liberty, or property, without due process of law . . ."

Statement of the Case.

Petitioner ("Revere") seeks review of the decision of the Supreme Judicial Court for the Commonwealth of Massachusetts holding Revere liable to pay for the medical expenses of a felony suspect injured during the course of an arrest effected by its police force. According to the Supreme Judicial Court, Revere's obligation to pay respondent Massachusetts General Hospital ("MGH") could not be implied from the common law or imposed by statute. Rather, the Supreme Judicial Court held that the Eighth Amendment to the United States Constitution required Revere to reimburse MGH for the costs of the emergency medical treatment.

The pertinent facts are not in dispute: On September 20, 1978, Revere police officers responded to a reported breaking and entering at a dwelling house in Revere (A. 13). At the scene, they observed one Patrick M. Kivlin ("Kivlin") with a suitcase and a pillowcase and they sought to detain him. Kivlin tried to run away and, after repeated warnings, and then a warning shot, a police officer shot him (A. 13). To secure treatment for Kivlin, Revere Police called the Nordstrum Ambulance Service, a private ambulance service. The ambulance took Kivlin to the emergency room at MGH where he was admitted for treatment of his gunshot wound. A Revere police officer accompanied Kivlin in the ambulance to MGH (A. 13). Kivlin was hospitalized at MGH from September 20 to September 29, 1978 (A. 14). MGH's charges for its treatment of Kivlin for this period were seven thousand, nine hundred and forty-eight dollars and fifty cents ($7,948.50) (A. 9).

On September 26, 1978, while Kivlin was still hospitalized, Revere police obtained a warrant for his arrest from the Chelsea District Court, the local court with appropriate jurisdiction (A. 14). Upon Kivlin's release from MGH on September 29, 1978, Revere police served the warrant and brought him to the Chelsea District Court for his arraignment. At the arraignment, the court granted Kivlin a continuance until December 1, 1978, and released him on personal recognizance (A. 14). Had Kivlin not been released on personal recognizance, or had he been unable to raise bail, he would have been sent to the Charles Street House of Correction in the city of Boston, or another like facility outside Revere. Revere has no jail or similar custodial institution within its city limits or under its control (A. 14).

On October 18, 1978, MGH sent a bill for services rendered in the treatment of Kivlin to the Chief of the Revere Police Department. The Chief immediately responded to MGH with a letter denying any responsibility for the expenses (A. 14).

On October 27, 1978, Kivlin was admitted to MGH for new treatment, including surgery (A. 10). Kivlin remained a patient at MGH until November 10, 1978, when he was discharged. MGH's fees for Kivlin's second hospitalization were five thousand, three hundred and sixty dollars and forty-one cents ($5,360.41) (A. 10). The record does not reflect that MGH made any effort at any time to collect its fees from Kivlin. Similarly, there is no indication in the record that Kivlin was indigent or otherwise unable to pay for the medical treatment (A. 7-15).

On January 17, 1979, MGH commenced this action against Revere in the Boston Municipal Court to recover the cost of the medical services rendered to Kivlin. Revere answered and caused the case to be removed to the Superior Court for Suffolk County, a trial court of the Commonwealth with more general jurisdiction (A. 1, 3-5). After completion of the pleadings, MGH moved for summary judgment, Mass.R.Civ.P. 56, and the motion was referred to a special master for hearing (A. 6). After hearing, the special master wrote a report to the superior court, recommending that judgment enter for Revere since, according to the special master, there was no common law, statutory or constitutional basis for a recovery against Revere (A. 16-20). The trial judge, after reviewing the report of the special master and the papers on file in the case, agreed with the conclusions of the special master, entered summary judgment for Revere and dismissed MGH's complaint (A. 1-2). After the entry of judgment for Revere, MGH duly filed its appeal to the Appeals Court, and after entry of the appeal in the Appeals Court, the Supreme Judicial Court transferred the case to its docket on its own motion (A. 24).

The Supreme Judicial Court, after hearing, reversed the judgment of the trial court. Although MGH argued that its right to recover was grounded both in state law and the Constitution, the Supreme Judicial Court rejected all state law

claims. Indeed, the court held that it would be *illegal* under state law to imply any contract between MGH and Revere (A. 24-26). Nevertheless, the court held that the Eighth Amendment to the United States Constitution mandated that Revere reimburse MGH. As the court stated, 385 Mass. at 774, 434 N.E.2d at 186, A. 24:

> While there is no contractual basis for recovery, we hold that the constitutional prohibition against cruel and unusual punishment, embodied in the Eighth Amendment to the United States Constitution, requires that Revere be liable to the hospital for the medical services rendered to Kivlin during his first stay at the hospital . . .

In its decision, the Supreme Judicial Court relied on *Estelle* v. *Gamble*, 429 U.S. 97 (1976), as the authority for Revere's liability. According to the court, *Estelle's* prohibition against "deliberate indifference" to the medical needs of prisoners created a legal duty on the part of Revere to supply the suspect with "necessary medical care" (A. 26). But more than simply an obligation to provide the suspect with access to services, this Eighth Amendment duty, according to the Supreme Judicial Court, required Revere to reimburse MGH for the services it had already provided. Under the court's holding, Revere's Eighth Amendment duty to pay was unconditional; Revere was obligated to pay whether or not Kivlin was indigent and whether or not other parties or other resources were available to reimburse MGH (A. 29).

Even Revere's contention that *Estelle* was limited to prisoners in jail or other institutional setting was flatly rejected

by the Supreme Judicial Court. As the court stated, 385 Mass. at 777, 434 N.E.2d at 188, A. 27:

> It is not the fact of incarceration, however, that triggers the protections afforded by the Eighth Amendment. Rather, it is the suspect's loss of freedom when he "cannot by reason of the deprivation of his liberty, care for himself," . . . that requires the government to begin to provide medical care. (Citations omitted.)

Whether the Eighth Amendment creates, under these circumstances, an absolute duty on the part of a municipality to reimburse the health care provider for the costs of emergency medical treatment is the central issue posed by this case.

Summary of Argument.

The Supreme Judicial Court's opinion sets forth the proposition that, although prohibited under state law, Revere was obligated under the Eighth Amendment to pay MGH for the emergency treatment rendered to Kivlin, the injured suspect. This holding is erroneous since the Eighth Amendment prohibition against "cruel and unusual punishments" has no application to a person such as Kivlin, not yet convicted of any crime. If the Eighth Amendment applied to Kivlin, however, it still would not require Revere to reimburse MGH for the costs of Kivlin's emergency treatment.

The Eighth Amendment prohibition against cruel and unusual punishments solely concerns the state's power to punish. Thus, the Eighth Amendment has been applied to limit the kinds of punishments imposed, to proscribe excessive

punishments and to restrict the type of activity that may be made criminal. The state has no power to punish, however, until it has secured a "formal adjudication of guilt in accordance with due process of law." *Ingraham* v. *Wright*, 430 U.S. 651, 671 (1977). Therefore, the Eighth Amendment prohibition against "cruel and unusual punishments" cannot be applied to a criminal suspect like Kivlin who has not yet been convicted of any crime.

Even if the Eighth Amendment protection could somehow be extended to cover Kivlin, it would not require Revere to pay MGH for the costs of Kivlin's care. Under the rule of *Estelle* v. *Gamble*, 429 U.S. 97 (1976), the Eighth Amendment proscribes "deliberate indifference to serious medical needs of prisoners." Although the rule of *Estelle* necessarily imposes on government an affirmative obligation to provide certain medical care, this affirmative duty cannot exist outside of an institutional setting. In a government institution, the individual is "wholly dependent" on the state to provide for basic needs, including medical care. *Youngberg* v. *Romeo*, ___ U.S. ___, ___, 102 S.Ct. 2452, 2459 (1982). An injured suspect such as Kivlin is not totally dependent on the state, as he has not been institutionalized, and thereby deprived of his freedom. Rather, he is in the same position as any other private citizen injured and in need of emergency medical care. The Eighth Amendment does not require Revere to pay for the emergency medical treatment rendered to its citizens; neither does it obligate Revere to pay MGH for Kivlin's emergency care.

In asserting its claim based on the Eighth Amendment, MGH relied exclusively on the constitutional rights of its patient Kivlin. As a matter of sound discretion, this Court should decline to grant MGH standing to assert the constitutional rights of third-parties not before the Court.

Based on the record in this case, the substantive right of Kivlin that MGH asserts — the right to emergency medical care — was in no real jeopardy. Kivlin was given all the medical care that was required, as MGH was obligated to do under state law. If the rights of criminal suspects such as Kivlin are subject to future jeopardy, it will only be because hospitals such as MGH, here the "champion" of Kivlin's rights, will refuse to render emergency care. Even if this remote possibility occurs, the rights of the criminal suspect can be fully protected by a personal action brought by the suspect. In short, there is no compelling reason to deviate from the accepted rule of only permitting parties to assert their own constitutional rights and not the rights of others.

If this Court accords MGH standing to assert Kivlin's rights, the constitutional provision to be applied in this case is the Due Process Clause of the Fourteenth Amendment, not the Eighth Amendment prohibition against cruel and unusual punishments. Properly applied, the Due Process Clause does not require Revere to reimburse MGH for the cost of Kivlin's treatment.

The Due Process Clause creates a limitation on the exercise of governmental power. But because Revere could not deprive Kivlin of his liberty to seek emergency medical care does not mean that the Due Process Clause requires Revere to pay for the treatment rendered. The Due Process Clause simply does not require states or municipalities to provide substantive services for its citizens. Whether Revere is obligated to reimburse MGH is a matter of state, not constitutional law.

Argument.

I. The Eighth Amendment Prohibition Against Cruel and Unusual Punishments does Not Require Revere to Reimburse MGH for the Costs of Emergency Medical Treatment.

In its decision, the Supreme Judicial Court relies on the Eighth Amendment to find Revere liable to MGH for the medical treatment rendered to Kivlin. The court expressly holds that the Eighth Amendment "requires that Revere be liable to the hospital." 385 Mass. at 774, 434 N.E.2d at 186, A. 24. This remarkable holding, mandating payment as a direct result of the Eighth Amendment, ignores important principles enunciated in prior opinions of this Court and distorts the meaning and purpose of the Eighth Amendment.

This Court has repeatedly emphasized that the Eighth Amendment simply does not apply to factual circumstances such as those in this case. *Ingraham* v. *Wright*, 430 U.S. 651, 664 (1977); *Bell* v. *Wolfish*, 441 U.S. 520, 535 (1979). As prior decisions of this Court make clear, the historical background of the Eighth Amendment relates to the imposition of criminal sanctions and the desire to prevent excessive or barbarous punishments. See *Gregg* v. *Georgia*, 428 U.S. 153, 168-173 (1976) (joint opinion of Stewart, Powell and Stevens, JJ.); *Furman* v. *Georgia*, 408 U.S. 238, 316-328 (1972) (Marshall, J., concurring). Similarly, judicial interpretations of the Eighth Amendment have dealt with criminal punishments by limiting the kind of punishments imposed,[1] proscribing grossly excessive punishments,[2] and by placing substantive limits upon

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[1] See *Trop* v. *Dulles*, 356 U.S. 86 (1958) (expatriation for desertion); *Estelle* v. *Gamble*, *supra*, (prison officials' imposing "punishment" by deliberate indifference to prisoner's serious medical needs).

[2] See *Weems* v. *United States*, 217 U.S. 349 (1910); *Hutto* v. *Finney*, 437 U.S. 678 (1978).

activity that may be made criminal.[3] See *Ingraham*, *supra*, at 666-668 and cases cited.

Therefore, if a case falls outside of the criminal process and the imposition of criminal sanctions, the Eighth Amendment prohibition against "cruel and unusual punishments" is inapplicable. As this Court stated in *Ingraham*, *supra*, at 617-672, n.40:

> Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions . . . [T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law. Where the State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment. (Citations omitted.)

In this case, the Eighth Amendment has no application whatsoever to one in Kivlin's situation who was injured while being apprehended by the police. *Ingraham*, *supra*. See also *Bell* v. *Wolfish*, *supra*, at 579 (Stevens, J. dissenting). Neither the Commonwealth nor Revere had "secured a formal adjudication of guilt" against Kivlin at the time the medical treatment was rendered (A. 16). Indeed, Kivlin's initial arraignment did not take place until after he was discharged from MGH (A. 16). Likewise, Kivlin could in no sense be considered a "prisoner." After his arraignment, he was released on his personal recognizance (A. 16). Even if the Commonwealth or Revere had demanded that Kivlin be held in custody

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[3] See *Robinson* v. *California*, 370 U.S. 660 (1962).

pending arraignment, he would have been sent to the Charles Street Jail in Boston or a similar facility outside Revere, since Revere has no jails within its boundaries and maintains no detention facilities (A. 16). Under these circumstances, Kivlin is simply not eligible — and has no need — for any Eighth Amendment protection.

Even if the umbrella of Eighth Amendment protection could somehow be broadened to cover one in Kivlin's situation, it still would not require Revere to reimburse MGH for the cost of Kivlin's medical treatment. As previously stated, the Supreme Judicial Court implied a duty to pay from the rule of *Estelle* v. *Gamble, supra*. Yet the extension of *Estelle's* proscription of "deliberate indifference to serious medical needs of prisoners" to requiring payment for medical treatment can only apply, if at all, in the context of a prison or similar custodial facility. An affirmative duty to provide medical care, along with food, shelter, and clothing, can only arise in an institutional setting, where the individual is "wholly dependent" on the imprisoning authority. *Youngberg* v. *Romeo*, ___ U.S. ___, ___, 102 S.Ct. 2452, 2459 (1982); *Estelle, supra* at 103. Outside of these institutions, government has no affirmative obligation to provide its citizens medical care, or other essentials of support. See *Maher* v. *Roe*, 432 U.S. 464, 469 (1977) ("The Constitution imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents"); *Lavine* v. *Milne*, 424 U.S. 577, 584 n.9 (1976) ("Welfare benefits are not a fundamental right, and neither the State nor Federal Government is under any sort of constitutional obligation to guarantee minimum levels of support"); *Lindsey* v. *Normet*, 405 U.S. 56, 74 (1972) (no constitutional guarantee of adequate housing). Even in the institutional setting, the constitution mandates no specific ways of meeting basic needs. Instead, administrators traditionally enjoy broad

discretion in devising plans to meet these affirmative obligations. See *Bounds* v. *Smith*, 430 U.S. 817, 825, 830 (1977); *Hutto* v. *Finney*, 437 U.S. 678, 687 (1978).

A criminal suspect such as Kivlin, however, is in a different position from a prisoner committed to a correctional facility. Unlike the prisoner who must rely on prison authorities to meet his needs, a suspect has not been stripped of means, financial and otherwise, with which to secure and pay for necessary medical treatment. To the contrary, Kivlin demonstrated the resources at his disposal by returning to MGH after his arraignment and securing additional treatment, services that the hospital voluntarily administered (A. 10).

Revere does not contend that its police officers could deliberately withhold or delay treatment for Kivlin after he was injured. Rather, the police acted properly and responsibly in immediately calling an ambulance to secure necessary medical attention for Kivlin (A. 13). Kivlin's right not to be denied prompt access to medical treatment, however, simply cannot be equated with an obligation to pay for this treatment outside the context of a prison with inmates who "cannot by reason of the deprivation of . . . liberty, care for [themselves]." *Estelle, supra*, at 104, quoting *Spicer* v. *Williamson*, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926).

As the prior decisions of this Court make clear, the Eighth Amendment provides persons convicted of crimes with essential protection against excessive punishment and onerous conditions of confinement. Notwithstanding the opinion of the Supreme Judicial Court, the Eighth Amendment does not provide any basis for holding Revere liable to reimburse MGH for the expenses of emergency medical treatment of an injured criminal suspect.

II. MGH has No Standing to Assert the Constitutional Rights of the Criminal Suspect as a Basis for Recovery Against Revere.

The Supreme Judicial Court determined that MGH had standing to raise Kivlin's Eighth Amendment claim since "standing to litigate constitutional issues is sometimes granted to persons asserting the rights of others, especially when it would be difficult for the person whose rights are asserted to litigate them."[4] Far from championing rights that would otherwise be difficult to protect, MGH was permitted to raise third-party rights subject to mere speculative or hypothetical danger. Therefore, the Supreme Judicial Court erred in permitting MGH to litigate in this case the rights of Kivlin, the injured criminal suspect.

This Court has often enunciated the principle that limitations on a litigant's right to raise third-party claims "stem from a salutary 'rule of self-restraint' designed to minimize unwarranted intervention into controversies where the applicable constitutional questions are ill-defined and speculative." *Craig* v. *Boren*, 429 U.S. 190, 193 (1976). This principle is designed to avoid unnecessary adjudications of constitutional rights, either because the rights are not truly threatened or the litigant is not an appropriate advocate of the rights in question. Both considerations militate against according MGH standing in this case.

At the outset, it is clear that in Massachusetts, through a combination of laws and policies, an injured suspect such as Kivlin will receive emergency medical attention regardless of whether municipalities provide reimbursement to hospitals. For example, all hospitals in Massachusetts with a certified

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[4] *Massachusetts General Hospital* v. *Revere*, 385 Mass. 772 at 777 n.7, 434 N.E.2d 185 at 188, A. 27, citing *Barrows* v. *Jackson*, 346 U.S. 249 (1953).

emergency unit are required by statute to provide emergency services to all requiring them, without discrimination on account of the source of payment or economic status. Mass. Gen. Laws c. 111, § 70E(k). Hospitals refusing to provide treatment under these circumstances would be subject by statute to malpractice liability. Mass. Gen. Laws c. 111, § 70E and c. 231, § 60B-E.

Similarly, public welfare statutes provide for financial assistance for needy persons requiring medical care. See Mass. Gen. Laws c. 118E. Federal regulations prescribe that hospitals that have received grants under the Hill-Burton Act, c. 958, § 601 *et seq.*, 60 Stat. 1041 (1946), codified at 42 U.S.C. § 291 (1976), must supply a reasonable amount of free care to indigents for at least 20 years, 42 U.S.C. § 291c(e), 42 C.F.R. § 124.503(a). Hospitals that have received or will receive aid under Title XVI of the Public Health Service Act must provide such care indefinitely. 42 U.S.C. 300o-3(b)(1)(J). Furthermore, any hospital assisted by either program is required to make emergency care available to all, regardless of ability to pay. 42 C.F.R. § 124.603(b)(1).[5]

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[5] These enactments reflect the policies adopted in other states imposing a duty on hospitals with emergency facilities to treat all people in need. *See e.g. Guerrero* v. *Copper Queen Hospital*, 112 Ariz. 104, 537 P.2d 1329 (1975); *Wilmington General Hospital* v. *Manlove*, 54 Del. 235, 174 A.2d 135 (1961); *Mercy Med. Ctr. of Oshkosh, Inc.* v. *Winnebago County*, 58 Wis.2d 260, 206 N.W.2d 198 (1973). *Dade Cty.* v. *Hospital Affiliates Intern.*, 378 So.2d 43 (Fla. App. 1979). Commentators have suggested that this judicially-recognized duty on hospitals to provide emergency care is now well-established. *See, e.g.* Dougherty & Dougherty, Moral Reconstruction in the Hospital: A Legal and Philosophical Perspective on Patient Rights, 14 *Creighton L. Rev.* 1409, 1410-11 (1981); Ficarra, The Hospital Emergency Room and the Law, 12 *Cal. W. L. Rev.*, 223, 236 (1976); G. Annas, *The Rights of Hospital Patients* 37 (1975). Finally, the standards promulgated by the Joint Commission on Accreditation of Hospitals, published in the Accreditation Manual for Hospitals, provide that: "Any individual who comes to the hospital for emergency medical evaluation or initial treatment shall

These laws and policies merely confirm the practices evidenced in this case. An emergency patient, such as Kivlin, will receive the care required regardless of the patient's ability to pay or the source of payment, including the availability of municipal reimbursement. At stake in this litigation, therefore, is nothing more than determining the source of "remuneration for professional services."[8]

Even if the suspect's right to emergency medical treatment could somehow be deemed to be in jeopardy, MGH should nonetheless be denied standing. For if these rights were truly endangered, the criminal suspect would be quite capable of bringing an action to vindicate the personal rights at stake.

That few bona-fide obstacles exist to a suspect's personal action can be seen by comparison with two prior cases that permitted the assertion of third-party rights, *Barrows* v. *Jackson*, 346 U.S. 249 (1953), relied on by the Supreme Judicial Court, and *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449 (1958). In *Barrows*, a seller of land subject to a racially restrictive covenant was permitted to assert the equal protection rights of third parties in defense to a damage action brought against the seller. The assertion of the rights of third parties in *Barrows* was essential to the protection of these rights. Had the seller been denied the ability to raise the equal protection claims of potential buyers, and had the civil action for damages produced the likely outcome of compliance with the restrictive covenant, it would have been virtually impossible for anyone to vindicate the fundamental rights involved.

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be properly assessed by qualified individuals and appropriate services shall be rendered within the defined capability of the hospital." Accreditation Manual for Hospitals, Joint Commission on Accreditation of Hospitals, at p. 23 (1981 ed.).

[8] *Singleton* v. *Wulff*, 428 U.S. 106, 129 (1976) (Powell, J., dissenting).

Similarly, in *N.A.A.C.P.* v. *Alabama*, *supra*, the N.A.A.C.P. was permitted to raise the associational rights of its members in resisting a court order to reveal its membership list. The assertion of the rights of third parties was deemed essential in *N.A.A.C.P.*, since "to require that [the rights] be claimed by the members themselves would result in nullification of the right at the very moment of its assertion." *Id.* at 459.

Suspects such as Kivlin face none of the difficulties addressed in *Barrows* and *N.A.A.C.P.* If MGH is not permitted to champion their alleged rights to emergency medical treatment, they do not face dilution of their rights. See Note, Standing to Assert Constitutional Jus Tertii, 88 Harv. L. Rev. 423, 432 (1974). There is simply no reason to conclude that, absent reimbursement from the municipality that effects the arrest, hospitals such as MGH will depart from established practice and will cease rendering emergency service to those in need of care, including injured suspects.

Even if hospitals such as MGH should decide that the existing laws, policies and customs in Massachusetts do not compel them to treat injured suspects in reliance on existing sources of reimbursement, the injured suspect faces no obstacles to the vindication of any rights to emergency medical care. If the arresting officers deprive the suspect of liberty interests in not securing treatment, the suspect may bring an action in state or federal court pursuant to 42 U.S.C. § 1983. Likewise, if the hospital refuses to render appropriate treatment, the suspect may bring an action for malpractice under Mass. Gen. Laws c. 231, § 60B-E.

Under these circumstances, it would be appropriate for this Court to defer consideration of an injured suspect's right to medical care until an actual case is presented wherein these rights are threatened. This case clearly does not fall within this class and the determination of the Supreme Judicial Court

that MGH had standing to assert the rights of an injured suspect is erroneous and ought to be reversed.

III. Revere has No Constitutional Duty to Reimburse MGH for the Expenses of Emergency Medical Treatment.

At the core of the Supreme Judicial Court's decision was the concept that MGH had a right to reimbursement arising directly from the constitution. According to the Supreme Judicial Court, this right to reimbursement could not be derived from an implied contract based on a constitutional duty, as no implied contract could be recognized under Massachusetts law. Rather, MGH's right to reimbursement was viewed as an essential component of the substantive constitutional right. See 385 Mass. at 774; 434 N.E.2d at 186, A. 24. Although the Supreme Judicial Court clearly erred in relying on the Eighth Amendment,[7] it would also be erroneous to reach the same result under the applicable constitutional provision, the Due Process Clause of the Fourteenth Amendment.

As previously stated, the rights of persons in official custody prior to criminal conviction are not governed by the Eighth Amendment, but by the Due Process Clause of the Fourteenth Amendment. *Ingraham* v. *Wright*, 430 U.S. 651, 671 (1977). The substantive rights that due process protects are the "liberty" interests of the individual. See *Youngberg* v. *Romeo*, ___ U.S. ___, ___, 102 S.Ct. 2452, 2458 (1982). Analysis of the "liberty" interests of the suspect in this case does not lead to the conclusion that Revere must reimburse MGH for the costs of emergency medical care.

The Due Process Clause creates a limitation on the exercise of governmental power. Thus, Revere police could not delib-

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[7] See Part I, *supra*.

erately withhold or delay treatment for Kivlin simply because he was suspected of a crime. Similarly, merely because Kivlin was a criminal suspect could not deprive him of the liberty to get necessary medical attention for his injuries. Like any private citizen in need of emergency treatment, Kivlin must be provided with access to appropriate care. Any action on the part of Revere inconsistent with providing Kivlin prompt access to emergency medical care could therefore conceivably violate Kivlin's bona-fide "liberty" interests. But like a private citizen in an emergency, the "liberty" to seek care carries with it no guarantee that government will pay for the services rendered.

This Court has recognized the difference between this restraint on the exercise of governmental power and a provision requiring the allotment and expenditure of municipal funds. As stated in *Harris* v. *McRae*, 448 U.S. 297, 317-318 (1980):

> [T]he liberty protected by the Due Process Clause . . . does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom. To hold otherwise would mark a drastic change in our understanding of the Constitution. It cannot be that because government may not prohibit the use of contraceptives, or prevent parents from sending their child to a private school, government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools. To translate the limitation on governmental power implicit in the Due Process Clause into an affirmative funding obligation would require Congress to subsidize the medically necessary abortion of an indigent women even if Congress had not enacted a Medicaid program to subsidize other medically necessary services. Nothing in the Due Process Clause supports such an extraordinary result. (Citations and footnotes omitted.)

Despite pressures to do so, this Court has resisted other efforts to transform the Due Process Clause into the key that unlocks the public treasury. As articulated most recently in *Youngberg* v. *Romeo*, ___ U.S. ___, ___, 102 S.Ct. 2452, 2459 (1982): "As a general matter, a State is under no constitutional duty to provide substantive services for those within its borders." See also *Maher* v. *Roe*, 432 U.S. 464, 469 (1977) (medical treatment); *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970) (welfare benefits); *Lavine* v. *Milne*, 424 U.S. 577, 584 (1976) (same); *Lindsey* v. *Normet*, 405 U.S. 56, 74 (1972) (no constitutional guarantee of adequate housing). Thus, while Revere may not deny an injured suspect, such as Kivlin, access to medical treatment, it is not therefore obliged, as a matter of constitutional law, to pay for the cost of the treatment rendered.

If an issue of payment does arise, it is appropriately treated as a matter of state or local law. The issues raised in this case have been so treated by courts around the country. For example, in *Trinity Hospital Association* v. *City of Minot*, 76 N.W.2d 916 (N.D. 1956), the Supreme Court of North Dakota, on facts virtually identical to those in this case, refused to hold the city of Minot liable. After reviewing the pertinent statutes of North Dakota, the court held that the theories of quantum meruit or implied contract could not be applied to the case.

The Supreme Court of Connecticut, in *Windham Commun. Mem. Hosp.* v. *City of Willimantic*, 166 Conn. 113, 348 A.2d 651 (1974), likewise found that a municipality was not liable for the medical expenses of an injured suspect. (See also *King County* v. *City of Seattle*, 70 Wash. 2d 988, 425 P.2d 887, 890 (1967) (Supreme Court of Washington held that a city was not liable to a county hospital for medical treatment rendered to a suspect injured by city police, since sheriff's only duty was to deliver the injured party to the hospital for treatment)).

Other state courts have ruled that the municipality must be held liable, but the basis of liability has been state statutory or common law. For example, in *Mt. Carmel Med. Center* v. *Bd. of Cty. Com'rs*, 1 Kan. App. Ct. 2d 374, 566 P.2d 384 (1977), the Court of Appeals of Kansas held that the hospital was entitled to payment from a county based upon Kansas law. As the *Mt. Carmel* court stated, 566 P.2d at 387:

> Both parties agree that in Kansas a sheriff has a duty to furnish medical attention to a prisoner in his custody who is in need thereof, at the county's expense if the prisoner is indigent and no other source of funds is available. This is clearly the law in Kansas.

(See also *Dodge City Med. Center* v. *Bd. of Cty. Com'rs*, 6 Kan. App. Ct. 2d 731, 634 P.2d 163 (1982); *Hospital Services Inc.* v. *Dumas*, 297 N.W.2d 320 (N.D. 1980); *Spicer* v. *Williamson*, 191 N.C. 487, 132 S.E. 291 (1926).

Elsewhere, decisions have been predicated on statutory enactments. Thus, in *City of Tulsa* v. *Sisler*, 285 P.2d 422 (Okl. 1955), municipal liability was based on a statute that expressly required officials to tend to the medical needs of prisoners in custody. See also *Lamar* v. *Board of Com'rs*, 4 Ind. App. 191, 30 N.E. 912 (1892).

Only one other state, Nebraska, has fashioned municipal liability based upon a constitutional duty. In *Lutheran Medical Center* v. *City of Omaha*, 204 Neb. 292, 281 N.W.2d 786 (1979), the Supreme Court of Nebraska held that the City of Omaha was liable for the cost of medical services provided to both a prisoner in the city jail and a criminal suspect not yet convicted. Yet even *Lutheran Medical Center* relied on the Constitution simply as establishing a duty to provide care; it

relied solely on state law to create the implied contract to provide for reimbursement to the hospital for the services rendered. See *Lutheran Medical Center, supra*, 204 Neb. at 296, 281 N.E.2d at 789. In short, the determination of how hospitals are to be paid for emergency treatment is an issue of state law to be decided by the states.[8]

The decision of the Supreme Judicial Court is unique in holding that a constitutional right of access to medical care includes a municipal duty to pay the hospital for the care provided. If permitted to stand, the decision of the Supreme Judicial Court will require that the Constitution displace the various state solutions, both legislative and judicial, to the problems posed by the fact pattern in this case. To demonstrate that the Constitution requires no such result, this Court should reverse the opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts.

Conclusion.

The opinion of the Supreme Judicial Court grafted onto the Eighth Amendment limitation on the exercise of government's power to punish an affirmative funding obligation on the part of local government. This result clearly distorts the purpose and function of the Eighth Amendment as enunciated in the opinions of this Court. It further demonstrates that the rules against permitting parties to assert the rights of others not before the court are appropriate and ought to be invoked in this case to bar MGH's claim.

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[8] See pp. 13-14 and n.5, *supra*. The issue may be determined based upon the availability of governmental funding. For example, in Massachusetts, strict limits have been set on the power of municipalities to levy taxes and spend the revenues collected. See c. 580 of the Acts of 1980.

If permitted to stand, the Supreme Judicial Court's opinion will increase pressures to create entitlements to public funds resting on the Eighth Amendment and other constitutional provisions. To make clear that the Eighth and Fourteenth Amendments permit no such result, this Court should reverse the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts.

Respectfully submitted,

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No. 82-63.

In the
Supreme Court of the United States.

OCTOBER TERM, 1982.

CITY OF REVERE,
PETITIONER,

v.

MASSACHUSETTS GENERAL HOSPITAL,
RESPONDENT.

ON A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Brief for Respondent.

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Questions Presented.

1. Where the Massachusetts Supreme Judicial Court found that the City of Revere waived any objection to the standing of the Massachusetts General Hospital ("MGH"), may Revere raise the argument for the first time in this Court and, if so, does MGH have standing under federal law to assert the treatment rights of its patient in the custody of Revere?

2. Does the remedial system developed by the Massachusetts Supreme Judicial Court to implement pre-trial detainees' substantive constitutional right to necessary medical treatment raise a substantial federal issue for this Court to review?

3. In order to protect the constitutional rights of pre-trial detainees, may a state require its municipalities to bear, at least in the first instance, the costs of medical care provided to the detainees at the municipalities' request?

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No. 82-63.

In the
Supreme Court of the United States.

OCTOBER TERM, 1982.

CITY OF REVERE,
PETITIONER,

v.

MASSACHUSETTS GENERAL HOSPITAL,
RESPONDENT.

ON A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Brief for Respondent.

Summary of Argument.

The state court's consideration of substantive rights provided by the Eighth Amendment is harmless error, since unconvicted prisoners have rather than the Fourteenth even greater rights to medical care under the Fourteenth Amendment.

In this Court, Revere claims for the first time that the Massachusetts General Hospital ("MGH") lacks standing. The Massachusetts Supreme Judicial Court's express finding under state law that Revere waived this argument is an independent state ground of decision not subject to review here. If the Court were to consider the question, it should find that MGH

does have standing under federal law to assert the rights of its patients in custody so those rights will be vindicated. And even if the Court were to find no federal standing, it should dismiss the writ of certiorari, since the state courts are bound by neither the Article III nor the prudential considerations on which federal standing rules are based. Moreover, Revere is but a municipality created by Massachusetts, and so has no standing itself to challenge a state rule requiring it to assume certain costs related to its police activities.

The remedial system created by the Supreme Judicial Court is a matter of state law. State law does not become federalized merely because it is intended to protect federal rights. Even if some federal law were intertwined in the decision below, this Court should take appropriate steps to insure that it is not passing on questions of state law or rendering an opinion that may prove to be merely advisory.

Massachusetts has a legitimate interest in protecting the constitutional rights of pretrial detainees. While a federal court must minimize its intrusion into state autonomy, the state courts are not so constrained. The state, whether through its legislature or its courts, may do more than is minimally necessary to prevent constitutional violations and may do so in a way that furthers other state policies.

Thus, if the Court were to reach the merits, it should give a measure of deference to the state court's remedy because Massachusetts is in the best position to determine the optimal way to protect the rights of its detainees, and no federal interest requires creation of a uniform national remedy for state pre-trial detainees.

A person in custody is entitled to *receive* appropriate care, not merely to have an opportunity to purchase it. Although Revere is not precluded from seeking reimbursement from a third-party payor or even from the detainee himself, in the first instance the obligation falls directly on the City and not on MGH. The Supreme Judicial Court's rule insures that detainees will receive necessary medical care as required by the Constitution.

Argument.

I. The Supreme Judicial Court's Consideration of the Eighth Amendment Instead of the Fourteenth is Harmless Error Because Both Provisions Require the Government to Care for Persons in Custody.

The Supreme Judicial Court based its decision on the need to protect the Eighth Amendment rights of persons in custody. 385 Mass. 772, 776 (1982). Because Kivlin was a pretrial detainee and not a convicted prisoner when he was brought to the Massachusetts General Hospital ("MGH"), the Hospital acknowledges that the relevant federal constitutional provision is the Due Process Clause of the Fourteenth Amendment. *Bell* v. *Wolfish*, 441 U.S. 520, 545 (1979); *Ingraham* v. *Wright*, 430 U.S. 651, 671-672 & n.40 (1977).[1]

The Supreme Judicial Court's consideration of the Eighth Amendment, however, does not undermine that court's decision. The due process rights of a suspect in custody (and still presumed innocent) are at least as great as the Eighth Amendment protections available to a prisoner already adjudicated guilty, and the corresponding governmental obligations are also at least as great. *Bell* v. *Wolfish*, *supra* at 545; *see Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1, 23 n.1 (1979) (Marshall, J., dissenting). "[T]he conditions for pretrial detention must not only be equal to, but superior to, those permitted for prisoners serving sentences for the crimes they have committed against society." (Citations omitted.) *Inmates of Suffolk County Jail* v. *Eisenstadt*, 360 F. Supp. 676, 686 (D. Mass. 1973), *aff'd* 494 F.2d 1196 (1st Cir.), *cert. denied sub nom. Hall* v. *Inmates of Suffolk County Jail*, 419 U.S. 977 (1974).[2]

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[1] These decisions were not raised by Revere in the proceedings below, but were cited for the first time by Revere in its petition for certiorari.

[2] *See also Inmates of Allegheny Cty. Jail* v. *Pierce*, 612 F.2d 754 (3d Cir. 1979) ("anomalous to afford a pretrial detainee less constitutional protection than one who has been convicted"); *Bowring* v. *Godwin*, 551 F.2d 44, 47 (4th Cir. 1977) (medical treatment for serious disease or injury required by Due Process Clause); *Duran* v. *Elrod*, 542 F.2d 998, 999-1000 (7th Cir.

Clearly, the Supreme Judicial Court's rationale — the prisoner's inability to care for himself — applies with equal force to a person under arrest but not convicted.[3] The only change in argument is purely nominal: the same analysis under a different constitutional rubric. Moreover, Revere has fully briefed the Fourteenth Amendment argument, and does not suggest that the ultimate result in the state court or in this Court turns on whether the analysis proceeds under the Eighth or Fourteenth Amendment.

Nor is there any prudential basis for now requiring greater precision from the Supreme Judicial Court. This Court has often decided cases on grounds analogous, though not identical, to those raised by the parties below. In *Stanley* v. *Illinois*, 405 U.S. 645 (1972), for example, the court converted a due process claim into equal protection analysis, *id.* at 658 n.10, over the dissent's objection that the grounds would come as a surprise to the prevailing party and the courts below, *id.* at 662. *See also Boynton* v. *Virginia*, 364 U.S. 454, 464 & n.2 (1960) (Whittaker, J., dissenting) (case decided under Interstate Commerce Act rather than the constitutional grounds consistently urged by petitioner); *Terminello* v. *Chicago*, 337 U.S. 1, 10 n.1 (1949) (Frankfurter, J., dissenting) (decision on constitutional argument never raised in state court); *Wuchter* v. *Pizzutti*, 276 U.S. 13, 25 (1928) (Brandeis, J., dissenting) (majority permits new line of argument).

Although this Court might choose to remand the case to allow the Supreme Judicial Court to consider whether payment in furtherance of Fourteenth Amendment (rather than

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1976) (more stringent standard when caring for pre-trial detainees); *Newman* v. *Alabama*, 503 F.2d 1320, 1330 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975) (Due Process Clause is "equally satisfactory constitutional repository of these rights and obligations"); *Johnson* v. *Glick*, 481 F.2d 1028, 1032 (2d Cir.) (Friendly, J.) (unconvicted prisoners must be at least as well cared for), *cert. denied sub nom. Employee-Officer John* v. *Johnson*, 414 U.S. 1033 (1973).

[3] Indeed, in guaranteeing the constitutional rights of unconvicted detainees, the Supreme Judicial Court presumably expected that it was resolving the issue for convicted prisoners as well. 385 Mass. at 777, 780 n.11.

Eighth Amendment) rights is appropriate,[4] it should be reluctant to do so where there is no reasonable likelihood of a change in analysis or outcome.

II. The Standing Argument Raised by Revere in This Court is Without Merit.

In this Court, Revere argues for the first time that MGH lacks standing to assert the constitutional rights of its patients (Pet. Br. 13-17). This section of MGH's brief first shows that the Supreme Judicial Court's finding that Revere waived this claim as a matter of state law may not be reconsidered by this Court, and that standing to proceed in the state court has been conclusively established. MGH next demonstrates that even if the Court were to consider the standing question under federal law, it should find that MGH may assert the constitutional rights of patients who are in pre-trial custody. In the conclusion of this section, MGH argues that the state court was free to hear this case even if MGH lacked standing as a matter of federal law, but that review by this Court would then be unavailable.

A. *This Court may Not Review the Supreme Judicial Court's Determination that MGH Had Standing to Proceed in State Court.*

The Supreme Judicial Court found, purely as a matter of state law, that Revere had waived any objection to MGH's standing by failing to raise the issue, and accordingly concluded that MGH had standing to proceed in the state judicial system.[5] This Court is required to respect that determination. The state court's finding of waiver is an independent state ground barring Supreme Court review of this issue. *See Engle*

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[4] It is reasonable to expect that the Supreme Judicial Court would permit the hospital to argue the Fourteenth Amendment, since otherwise the court would have been reversed (and the hospital's claim defeated) on the basis of cases never raised by Revere in the state courts.

[5] 385 Mass. at 776-77 n.7. The court cited the applicable state rule, Mass. R.App.P. 16(a)(4).

v. *Isaac*, 71 L.Ed.2d 783 (1982); *Webb* v. *Webb*, 68 L.Ed.2d 392, 398-399 & n.4 (1982); *Wainwright* v. *Sykes*, 433 U.S. 72, 81 (1977) (contemporaneous objection rule).[8] Accordingly, this Court may not review the Supreme Judicial Court's determination that MGH had standing to pursue its claim in the Massachusetts courts.

B. *If This Court Were to Consider the Standing Argument, it Should Find that MGH Has Standing as a Matter of Federal Law.*

Revere does not claim that MGH lacks standing under Article III, presumably because MGH has suffered actual injury through Revere's failure to pay. There is thus an actual controversy between the parties. *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 70 L.Ed.2d 700, 709 (1982). Revere therefore relies upon the prudential federal limitations on a plaintiff's right to assert the interests of the third parties. *See id.* at 711.

If the Court were to reach the question of standing in this case, it should conclude that here, much as in other situations where providers of health care seek to protect the constitutional rights of their patients, there is standing. This Court has held that physicians have a sufficiently concrete injury and a close enough professional relationship to assert constitutional rights not easily asserted by their pregnant patients. *Singleton* v. *Wulff*, 428 U.S. 106, 112-118 (1976) (plurality opinion of Blackmun, J.). Similarly, physicians have standing to raise their patients' rights to contraception. *Griswold* v. *Connecticut*, 381 U.S. 479, 481 (1965). And this Court never doubted that doctors had as much standing as their patients may have

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[8] There is no suggestion in this case that the state's waiver rule was itself applied in a way that violates any provision of the Constitution. *Compare NAACP* v. *Alabama*, 357 U.S. 449, 457-458 (1958); *see also Fay* v. *Noia*, 372 U.S. 391 (1963); *Henry* v. *Mississippi*, 379 U.S. 443 (1965). And even if this court were to review the question itself, it could not fail to agree that Revere waived the issue below. *See Chapman* v. *California*, 386 U.S. 18 (1967).

to assert a constitutional right to Medicaid funding for abortions. *Harris* v. *McRae*, 448 U.S. 297, 318 n.21 (1982).[7]

In allowing physicians the standing to assert the constitutional rights of their patients seeking contraceptives or abortions, the Court recognized that the people in these categories of patients would always be changing, and that often none of them would be in a good position to obtain judicial intervention before the immediate need had passed and the damage was done. Because of their professional relationship with these patients, the physicians (who themselves have an interest in providing approporiate medical care) are particularly appropriate litigants to protect the patients' rights. The same considerations apply to the class of pre-trial detainees. Those who are both injured and in custody may often be unable to assert effectively their right to medical treatment at the time the treatment is needed, and the group of detainees changes rapidly enough that an individual detainee may have little incentive to assert constitutional rights available to him as a member of the group.

C. *If This Court Were to Find that MGH has No Standing Under Federal Law, it Should Not Disturb the Supreme Judicial Court's Finding under State Law, but Should Dismiss the Writ.*

Even if this Court were to consider the standing question and conclude, contrary to the analysis above, that MGH lacks

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[7] For similar conclusions outside the context of medical care, see *Maryland* v. *Louisiana*, 68 L.Ed.2d 576, 589 (1981) (ultimate consumers on whom statutory tax would finally and inevitably fall); *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976) (party ultimately bearing burden); *Barrows* v. *Jackson*, 346 U.S. 249, 255-258 (1953) (property owner asserts rights of potential non-white purchasers not parties to the suit); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535 (1925) (school asserts rights of present and prospective patrons); *Truax* v. *Raich*, 239 U.S. 33 (1915) (employee challenges hiring law directly applicable only to employer); *Air Reduction Company* v. *Hickel*, 420 F.2d 592, 594 (D.C. Cir. 1969) (producers and distributors of helium attack federal regulations applicable to their purchasers); *Brewer* v. *Hoxie School District No. 46*, 238 F.2d 91 (8th Cir. 1956) (school board's suit to protect pupils' civil rights); *National Ass'n for Advance. of Colored People* v. *Patty*, 159 F. Supp. 503 (E.D. Va. 1958), *rev'd on other grounds sub nom. Harrison* v. *NAACP*, 360 U.S. 167 (1959) (organization providing legal assistance asserts rights of actual or potential clients).

standing as a matter of federal law, it should respect the Supreme Judicial Court's right to apply its own state law of standing. The federal limitations reflect a prudential "rule of self-restraint" applied by the *federal* courts in cases where participation of the federal judiciary is inappropriate. However, as Professor Tribe succinctly comments:

> federal standing requirements, whether dictated by article III or suggested by policy, all arise out of institutional concerns peculiar to the federal judiciary and are therefore irrelevant to the question of what more generous standing rules a state may adopt if it chooses to do so.

L. Tribe, *American Constitutional Law*, § 3-18 at 81 (1978).

The state courts need not follow federal rules of standing; they are free to decide questions of federal law even where a federal court could not do so because of lack of standing. *Doremus* v. *Board of Education*, 342 U.S. 429, 434 (1952). Massachusetts has not adopted the federal law of standing. *See Backman* v. *Secretary of the Commonwealth*, 387 Mass. 549, 559 n.5 (1982); *Wellesley College* v. *Attorney General*, 313 Mass. 722, 731, 42 N.E.2d 220 (1943).[8]

This Court's jurisdiction, however, is not expanded by a state court decision rendered under the state's broader rules of standing. If a case could not have been brought initially in federal court, it does not become a proper matter for federal review simply because the state court rendered a decision on the merits. *Princeton University* v. *Schmidt*, 70 L.Ed.2d 855, 858 n.* (1982); *Doremus* v. *Board of Education*, *supra*, 342 U.S. at 434; *Marshall* v. *Dye*, 231 U.S. 250 (1913); *Smith* v. *Indiana*, 191 U.S. 138 (1903); *Tyler* v. *Judges*, 179 U.S. 405 (1900); *see also Coleman* v. *Miller*, 307 U.S. 433, 466 (1939) (Frankfurter, J., dissenting in part).

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[8] For example, Massachusetts permits state court challenges to governmental expenditures on constitutional grounds when the federal courts would be closed under the doctrine of *Frothingham* v. *Mellon*, 262 U.S. 447 (1923). *See, e.g.*, Mass. Gen. Laws c. 29, § 63.

Revere's request that this Court reverse the Supreme Judicial Court on the grounds that MGH lacks federal standing would impose the federal rules on the states even though the federal institutional concerns which underly the standing doctrine do not necessarily apply in state courts. The Court should decline to do so. L. Tribe, *American Constitutional Law*, § 3-18 at 81 (1978).[9] Thus Revere's argument that MGH lacks federal standing proves too much. If Revere is correct, this Court should decline to decide the merits of the case, but should instead dismiss the writ of certiorari.

The Court should be attentive to an additional reason for dismissing the writ of certiorari: Revere itself, being but a "creature of the state," lacks standing to appeal this Court "in opposition to the will" of its creator. *Coleman* v. *Miller, supra* at 441; *Williams* v. *Mayor*, 289 U.S. 36, 40 (1933); *Trenton* v. *New Jersey*, 262 U.S. 182, 186-187 (1923); *Pawhuska* v. *Pawhuska Oil Co.*, 250 U.S. 394, 397 (1919); *Stewart* v. *Kansas City*, 239 U.S. 14, 16 (1915) (local governments "are instruments of the state, created to carry out its will"); *Braxton* v. *West Virginia*, 208 U.S. 192, 197 (1908) (regulation of municipal corporation is peculiarly within the domain of state control); *compare Washington* v. *Seattle School District No. 1*, 73 L.Ed.2d 896 (1982) (municipal body asserting constitutional rights of is constituents).[10] As MGH demonstrates in the following section, the state's apportionment of the costs of medical care among itself and its municipalities, private institutions and citizens is a matter of state law raising no federal question for this Court.

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[9] Naturally, the state determination of federal law which is not subject to Supreme Court review because of lack of standing will carry little precedential value outside the state's own judiciary. L. Tribe, *American Constitutional Law*, § 3-18 at 81 n.11 (1978).

[10] The allocation of fiscal responsibility among the various branches of the state is an exercise of state sovereignty in an area of integral governmental functioning over which the states traditionally exert control. Accordingly, this Court should not interfere. *Federal Energy Regulation Commission* v. *Mississippi*, 72 L.Ed.2d 532, 549-550 n.28 (1982); *Hodel* v. *Virginia Surface Min. & Recl. Ass'n*, 452 U.S. 264, 287-288 (1981); *National League of Cities* v. *Usery*, 426 U.S. 833, 845, 852-854 (1976). See Section III(A), below.

III. Massachusetts' Adoption of a Remedial Rule to Insure Provision of Constitutionally Required Medical Care is a Legitimate Exercise of the State's Authority to Govern its Own Internal Affairs.

If this Court finds sufficient federal standing, it must then proceed to the merits. The merits, however, do not involve the broad question Revere seeks to present to the Court: whether the Constitution requires a municipality to pay for medical services rendered to pre-trial detainees. Rather, the issue is a considerably narrower one requiring appropriate recognition of the states' role in our system of federalism: whether the state court's order directing municipalities to pay hospitals for the medical care provided to pre-trial detainees was a reasonable exercise of Massachusetts' authority to regulate its own internal affairs in implementing accepted constitutional norms. Thus, framed, the state court decision raises no substantial federal question for review by this Court.

A. *Massachusetts' Effort to Implement Accepted Constitutional Norms Presents No Federal Question for Review by This Court.*

In its decision below, the Supreme Judicial Court noted that, having shot and arrested Kivlin, the City of Revere was under "a legal duty to supply him with necessary medical care."[11] The court then concluded that "to ensure Kivlin's right to medical care, Revere must be held liable to the hospital for the medical services it rendered." This *implementing rule* was designed by the court to insure that constitutional rights of individuals in custody would not be neglected because of their possible inability to pay. The court apparently felt that if health care providers are assured payment for the

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[11] That constitutional right has been recognized in too many decision to require extensive citation. *See, e.g., Estelle* v. *Gamble*, 429 U.S. 97 (1976). Revere concedes "Kivlin's right not to be denied prompt access to medical care." Pet. Br. at 12, 18. The scope of that right is considered in more detail at n.22, below, and its constitutional sources (the Eighth and Fourteenth Amendments) are discussed in Section I, above.

care of persons in custody, treatment is more likely to be provided. *Compare Moe* v. *Secretary of Administration and Finance*, Mass. Adv. Sh. (1980) 464, 478, 417 N.E.2d 387 (lack of Medicaid reimbursement would discourage providers from performing abortions).

The burden is on Revere, as petitioner, to establish the existence of a constitutional issue to give this Court its jurisdiction. *Webb* v. *Webb*, 68 L.Ed.2d 392, 396 (1982); 28 U.S.C. § 1257(3). The city has not satisfied its burden. In holding Revere liable to MGH to insure Kivlin's constitutional right to medical care, the Supreme Judicial Court cited no federal cases and discussed no federal law.[12] There is no suggestion that the court believed itself bound by federal law to reach that particular result, or that it believed the same remedy should necessarily be applied in every state.[13] *See Cooper* v. *Mitchell Brothers*, 70 L.Ed.2d 262, 268 (1982) (Stevens, J., dissenting); *Missouri ex rel. Southern Railway Company* v. *Mayfield*, 340 U.S. 1, 5 (1950); *Minnesota* v. *National Tea Co.*, 309 U.S. 551, 554-555 (1940). Rather, the Supreme Judicial Court adopted the payment remedy only after reviewing other relevant state law and concluding that it was insufficient to guarantee the provision of medical care.[14]

The court's determination that this remedy was appropriate in Massachusetts to protect detainees' rights does not of itself present a federal question for review by this Court. Had the payment rule been adopted by Massachusetts through its state legislature, Revere could have brought no colorable claim to this Court. The fact that a different branch of Massachusetts government — here, the judiciary — adopted the same remedy raises no federal issue for Supreme Court consideration. As this Court has frequently observed, "the Fourteenth

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[12] *Compare City of Mesquite* v. *Aladdin's Castle, Inc.*, 71 L.Ed.2d 152, 167 (1982) (Powell, J., dissenting in part).

[13] Indeed, other states have adopted other remedies under their own law. See n.45, below.

[14] It can also be assumed the state court was mindful of its other developments in the area of patients' rights, and was aware of the tight system of controlling hospital costs in Massachusetts. See Section IV(B) and Section V, below.

Amendment leaves the States free to distribute the powers of government as they will between their legislative and judicial branches." *Hughes* v. *Superior Court*, 339 U.S. 460, 467 (1950). So long as Massachusetts does not violate individuals' constitutional rights, it may select any allocation of authority and may exercise plenary power over its instrumentalities of government, free from federal judicial review.[15] A state remedy is not federalized simply because it is adopted by the state to prevent possible constitutional violations. This is not to suggest that the states may adopt any remedial schemes they see fit in the name of protecting constitutional rights. But where a remedial rule's burden falls only upon municipal corporations created by the state, no constitutional interest is implicated.

B. *Even if a Federal Question is Intertwined in the Supreme Judicial Court's Decision, this Court Should Not Risk Reviewing State Law Issues by Considering the Merits.*

In the preceding section, MGH has argued that the Supreme Judicial Court sought to deter violations of the substantive constitutional rights of pre-trial detainees by fixing initial financial responsibility for necessary medical care on the municipalities. As such, the state court's decision was well

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[15] *See Washington* v. *Seattle School District No. 1*, 73 L.Ed.2d 896, 911 & n.18 (1982); *Id.* at 921 & n.7 (Powell, J., dissenting); *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n.6 (1981); *Id.* at 479-480 & nn.3-4 (Stevens, J., dissenting); *Gomillion* v. *Lightfoot*, 364 U.S. 339, 347 (1960); *see Gordon* v. *Lance*, 403 U.S. 1, 6 (1971); *Pawhuska* v. *Pawhuska Oil Co.*, 250 U.S. 394 (1919). It is instructive to remember that the more active role of the judiciary in many states has evolved quite naturally from the early days of state government when the courts, acting to develop the common law, were often the primary state lawmaking bodies. L. Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 N.Y.U.L. Rev. 1212, 1256 (1978).

[16] A state is "free to decide matters of concern to the State at the State, rather than local, level of government. *Washington* v. *Seattle School District No. 1*, 73 L.Ed.2d 896, 919 (1982) (Powell, J., dissenting, on a point with which the majority was in apparent agreement, *id.* at 911 n.18); *Sailors* v. *Board of Education*, 387 U.S. 105 (1967).

within the state's authority and presents no federal question. Revere, on the other hand, argues that this Court must act to correct an alleged error of federal law. In this section, MGH suggests that any doubts as to the source of the law applied by the Supreme Judicial Court should be resolved by declining to review the state court's decision.

This Court's power over state courts is limited to correcting errors in adjudication of federal rights. 28 U.S.C. § 1257(3); *see Murdock* v. *City of Memphis*, 87 U.S. (20 Wall.) 590, 626, 633 (1875) (*dicta*). Because of the prohibition on advisory opinions, the Court has consistently refused to consider judgments of state courts which rest on both federal grounds and on adequate and independent state grounds. *Herb* v. *Pitcairn*, 324 U.S. 117, 125-126 (1945); *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 210 (1935). Where the federal bases for the state decision are constitutional grounds, this approach also finds support in the policy of avoiding unnecessary decision of constitutional issues. *See Rescue Army* v. *Municipal Court*, 331 U.S. 549, 584 (1947) (constitutional issue must be "clean-cut," "concrete" and "unclouded").

If it is not clear whether the decision below rests on state law, federal law, or both, this Court should dismiss the case because the petitioner has not sustained the burden of establishing jurisdiction,[17] or should vacate the decision and remand it to the state court "for the elimination of obscurities and ambiguities." *Minnesota* v. *National Tea Co.*, 309 U.S. 551, 557 (1940); *City of Mesquite* v. *Aladdin's Castle, Inc.*, 71 L.Ed.2d 152, 163 & n.19 (1982).[18] Regardless of the particular

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[17] *See, e.g., Jankovich* v. *Indiana Toll Road Commission*, 379 U.S. 487 (1965) (despite the state court's extensive use of federal authority, case dismissed because the extent of possible state law grounds was unclear); *Durley* v. *Mayo*, 351 U.S. 277, 281 (1956) (petitioner must show that state court decision could not possibly rest on non-federal grounds); *Stembridge* v. *Georgia*, 434 U.S. 541, 547-548 (1952) (no jurisdiction where possibility of adequate state ground is even debatable); *Memphis Natural Gas Co.* v. *Beeler*, 315 U.S. 649 (1942); *Klinger* v. *Missouri*, 13 Wall. 257 (1871); *Patsy* v. *Florida Board of Regents*, 73 L.Ed.2d 172, 193 & n.10 (1982) (Powell, J., dissenting).

[18] Dismissal is the more appropriate action unless the Court finds a particular interest in further clarification and development of law in the area. *Cooper* v. *Mitchell Brothers*, 70 L.Ed.2d 262, 269 (1982) (Stevens, J., dis-

disposition, the Court should adhere to its policy of not considering the merits if the source of the law applied below is unclear. As the Court has observed, caution in this regard

> is not merely a technical rule nor a rule for our convenience. It touches the division of authority between state courts and this Court and is of equal importance to each. Only by such explicitness can the highest courts of the states and this Court keep within the bounds of their respective jurisdictions.

Minnesota v. *National Tea Co.*, 309 U.S. 551, 557 (1940). Accordingly, in doubtful cases

> it seems consistent with the respect due the highest courts of the states of the Union that they be asked rather than told what they have intended. If this imposes an unwelcome burden it should be mitigated by the knowledge that it is to protect their jurisdiction from unwitting interference as well as to protect our own from unwitting renunciation.

Herb v. *Pitcairn*, *supra*, 324 U.S. 128; *Oregon* v. *Hass*, 420 U.S. 714, 727 (1975) (Marshall, J., dissenting).

In the present case, the Supreme Judicial Court clearly recognized the federal Constitution as the underlying source of Kivlin's right to medical treatment. As argued above, it is reasonable to read the state court's opinion as fashioning a state remedy to implement that constitutional right — as an exercise of the state's discretion to adopt its own procedures to insure the substantive rights provided by the Constitution.[19] But insofar as this Court may be unsure of the extent to which

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senting); *Department of Mental Hygiene* v. *Kirchner*, 380 U.S. 194, 200-201 (1965) (most states had statutes similar to the one at issue). Alternatively, this Court might certify questions to the state court. *See* Supreme Judicial Court Rule 3:21, 359 Mass. 790 (1971); *cf. Zant* v. *Stephens*, 72 L.Ed.2d 222, 227 (1982); *Bellotti* v. *Baird*, 428 U.S. 132, 151 (1976).

[19] When the Supreme Judicial Court has acted strictly under the compulsion of federal law, it has known how to say so. *E.g.*, *Commonwealth* v. *Sheppard*, 387 Mass. 488, 489 (1982) ("We conclude that, *solely on the basis of the opinions of the Supreme Court of the United States*, the exclusionary rule requires the suppression of the evidence . . .") (emphasis added).

the Supreme Judicial Court believed itself to be fashioning Massachusetts law rather than simply stating an inexorable command of the federal Constitution, a decision on the merits would be inappropriate.[10]

IV. Even If This Court were to Review the State's Remedy, it Should Do So With Deference.

In the preceding section, MGH suggests that the remedy adopted by the Supreme Judicial Court does no more than place financial responsibility, at least in the first instance, on municipal corporations as a matter of state law in order to protect constitutional rights of pre-trial detainees. Now MGH argues that Massachusetts is free to carry out the mandate of the Constitution within broad limits and with particular attention to its own structural and legal principles, and that even if this Court were to review the state's remedy it should do so with considerable deference to the state's interests.

This case does not concern the question of whether Revere was under a constitutional obligation to insure that Kivlin received prompt medical treatment. Revere agrees that it

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[10] Refusal to reach the merits of the case would have several significant virtues. It might allow this Court to avoid unnecessary constitutional decision. *City of Mesquite* v. *Aladdin's Castle, Inc.*, 71 L.Ed.2d 152, 163 (1982); *Lake Carriers' Ass'n* v. *MacMullan*, 406 U.S. 498, 510-511 (1972); *Spector Motor Service* v. *McLaughlin*, 323 U.S. 101, 105 (1944); *see Larson* v. *Valente*, 72 L.Ed.2d 33, 65 (1982) (Rehnquist, J., dissenting). It would acknowledge that the state court is in the best position to express the "complete product" of its legal system, *Harrison* v. *NAACP*, 360 U.S. 167, 178 (1959); *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971) at 439 (Burger, C.J., dissenting) and 443-445 (Black, J., dissenting), and to resolve the essentially local problem of balancing costs of providing medical treatment without federal intrusion and possible disruption of the state system through an erroneous construction of the opinion below, *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496, 500 (1941); *see Rose* v. *Lundy*, 71 L.Ed.2d 379, 387 (1982). And, given the likelihood that the Supreme Judicial Court would reach the same conclusion under the state constitution, *see* 385 Mass. 776 n.6, a decision of this Court on the merits may thereafter prove to have been purely advisory, *Mills* v. *Rogers*, 73 L.Ed.2d 16, 25-27 (1982); *see Oregon* v. *Hass*, *supra* at 726 (Marshall, J., dissenting), and a needless imposition on the Court's workload, *see Webb* v. *Webb*, 68 L.Ed.2d 392, 399 (1982); *Idaho Department of Employment* v. *Smith*, 434 U.S. 100, 104 (1977) (*per curiam*) (Stevens, J., dissenting in part).

was. Nor does the state court decision raise the general issue of whether the government has an affirmative obligation to provide funds for individuals' exercise of their constitutional rights. *Compare Harris* v. *McRae*, 448 U.S. 297 (1980) (government may not interfere with right to abortion but is not required to pay). Clearly, most constitutional provisions limit the government's coercive power without imposing affirmative requirements of financial support. But the government's obligations become correspondingly greater when it has already taken affirmative steps to exert control over a person and limit his freedom of movement and personal autonomy. Similarly, the ability of a court (and especially a *state* court) to fashion relief that protects constitutional rights increases as well.

As a matter of federalism, the state courts have a legitimate interest in protecting individuals' constitutional rights within the state judicial system so that resort to the federal courts is unnecessary.[21] The institutional litigation of the past decade clearly shows that many federal courts have ordered improvement in jails and prisons, including improved delivery of medical care.[22] These same concerns need not always be ad-

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[21] The state courts have the "front-line responsibility for the enforcement of constitutional rights." *Gideon* v. *Wainwright*, 372 U.S. 335, 351 (1963) (Harlan, J., concurring); they are as bound as the federal courts to "guard and protect rights secured by the Constitution," *Ex Parte Royall*, 117 U.S. 241, 251 (1886), and this Court presumes that the states will be attentive to constitutional requirements, *Rhodes* v. *Chapman*, 452 U.S. 337 (1981). "[I]n the scheme of the Constitution, [state courts] are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones." H. Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1401 (1953). Commenting specifically on the protection of prisoners' constitutional rights, this Court has observed that "federal-state comity" reflects "an accommodation of our federal system designed to give the State the initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights." *Webb* v. *Webb*, 68 L.Ed.2d 392, 399 (1982), quoting *Picard* v. *Connor*, 404 U.S. 270, 275 (1971).

[22] Alabama has been ordered to identify the physical and mental health-care requirements of its inmates and to hire a specified number of mental health professionals. *Pugh* v. *Locke*, 406 F. Supp. 318, 329, 333 (M.D. Ala. 1976) *reversed on other grounds sub nom. Alabama* v. *Pugh*, 738 U.S. 781

dressed after the constitutional right has been violated. A state is permitted to adopt, on its own initiative, a remedial rule designed to reduce substantially the likelihood that detainees' constitutional rights would be violated in a foreseeable class of occasions: when ill or injured detainees are brought to a hospital for necessary treatment. The remedy selected, here

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(1978); *see also Newman* v. *Alabama*, 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975). Arkansas has been instructed to create a plan "ensuring that every inmate in need of medical attention will be seen by a qualified physician when necessary." *Finney* v. *Arkansas Board of Correction*, 505 F.2d 194, 204 (8th Cir. 1974). Florida has been told to care for the minor injuries and illnesses of its prisoners and detainees, as well as their major emergencies, and to provide both curative and preventive dentistry. *Jones* v. *Wittenberg*, 330 F. Supp. 707, 718 (N.D. Ohio 1971), *aff'd sub nom. Jones* v. *Metzger*, 456 F.2d 854 (6th Cir. 1972). Florida has also been directed to give a physical examination to each new pre-trial detainee, and to hire dermatologists and opthamologists. *Miller* v. *Carlson*, 401 F. Supp. 835 (M.D. Fla. 1975), *aff'd* 563 F.2d 741 (5th Cir. 1977).

Massachusetts has received constitutionally-based instructions from the federal courts regarding medical care of pre-trial detainees. In *Inmates of Suffolk County Jail* v. *Eisenstadt*, 360 F. Supp. 676 (D. Mass. 1973), *aff'd* 494 F.2d 1196, *cert. denied, sub nom. Hall* v. *Inmates of Suffolk County Jail*, 419 U.S. 977 (1974), the district court examined the overall level of care provided at the jail used by Boston (as well as by Revere and other surrounding municipalities) for holding prisoners awaiting trial. The court imposed many specific orders, including the requirement that inmates and pre-trial detainees remaining over seven days must receive complete physicals and those in solitary confinement must get a daily physical examination.

In addition to those cases imposing overall structural remedies on state prison systems, numerous cases have affirmed the prisoner's right to bring an action for damages (or for an injunction ordering treatment) as a result of inadequate or improper medical attention. The two approaches demonstrate that the possible remedies are not mutually exclusive. *See, e.g., Murrell* v. *Bennett*, 615 F.2d 306 (5th Cir. 1980) (bleeding ulcer and urological problems); *West* v. *Keve*, 571 F.2d 158 (3d Cir. 1978) (deliberate indifference to pain of varicose veins and swollen ankle); *Todaro* v. *Ward*, 565 F.2d 48, 52 (2d Cir. 1977) (Kaufman, C.J.) (denials of medical care "which cause or perpetuate pain"); *Bowring* v. *Godwin*, 551 F.2d 44 (4th Cir. 1977) (psychological or psychiatric treatment); *Westlake* v. *Lucas*, 537 F.2d 857 (6th Cir. 1976) (special diet, medication and medical care for bleeding ulcer); *Riley* v. *Rhay*, 407 F.2d 496 (9th Cir. 1969) (treatment for tuberculosis); *Johnson* v. *Harris*, 479 F. Supp. 333 (S.D.N.Y. 1979) (special diet for diabetic); *see also Isaac* v. *United States*, 490 F. Supp. 613 (S.D.N.Y. 1979) (medical care for federal prisoner's stomach disorder). As these cases also show, necessary medical treatment includes more than just emergency care.

the requirement that a municipality pay (at least in the first instance) its detainees' medical bills, is well within the range of reasonable options available to a state and should be respected by this Court.[23]

A. *In Seeking to Insure Protection of Constitutional Rights, Massachusetts May Assume for Itself a Broader Remedial System than the Federal Courts Could Properly Impose.*

A measure of deference to state-created remedies designed to protect constitutional rights is well established and consistent with principles of federalism. When a federal court imposes its own remedy on a state or its subdivisions to redress specific constitutional violations, the court "must take into account the interests of the state and local authorities in managing their own affairs, consistent with the Constitution." *Milliken* v. *Bradley*, 433 U.S. 267, 281 (1977) ("Milliken II"). The scope of the remedy is limited by the "nature and extent of the constitutional violation," so that federal intrusion into state affairs is minimized. *Milliken* v. *Bradley*, 418 U.S. 717, 744 (1974) ("Milliken I"), quoting *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971); *Fullilove* v. *Klutznick*, 448 U.S. 448, 483 (1980); *Hills* v. *Gautreaux*, 425 U.S. 282, 293 (1976).

If the remedy is merely damages, the state's control of its internal affairs is undiminished. But when the relief is structural — a general implementing rule to deter or prevent future constitutional violations by a state or its subdivisions — federalism demands that the remedy not intrude on the legitimate discretion of the state government to structure its own internal affairs. *Upham* v. *Seamon*, 71 L.Ed.2d 725, 830-831 (1982); *Wise* v. *Lipscomb*, 437 U.S. 535, 540 (1978)

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[23] The municipality is free, of course, to choose instead to hire its own physicians or to operate its own public hospital. Financial concerns expressed by the City of Boston in its amicus brief in support of the petition for certiorari could presumably be alleviated if Boston brought its detainees to Boston City Hospital rather than to one of the non-governmental facilities (such as MGH) within the city. See n.44, below.

(stricter review of remedy imposed on state by federal court); *Connor* v. *Finch*, 431 U.S. 407, 414 (1977) (recognition of state's policy goals); *Whitcomb* v. *Chavis*, 403 U.S. 124, 160-161 (1971) (federal courts must minimize rejection of state's policy choices).[24] When this Court writes of "Our Federalism," it has in mind

> a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Younger v. *Harris*, 401 U.S. 37, 44 (1971).[25] Thus, even where the Court is firm in announcing a constitutional mandate, it has been careful to leave the states a certain flexibility to implement that rule.

An example is *Griffin* v. *Illinois*, 351 U.S. 12 (1956), which considered whether the Constitution required Illinois to provide indigent criminal defendants with free trial transcripts for appeal. The Court concluded that criminal defendants may not be disadvantaged in their defense solely because of indigency, but, having found a constitutional shortcoming, was scrupulously careful to leave Illinois the flexibility to fashion a remedy: "We do not hold, however, that Illinois must pur-

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[24] Even outside the realm of constitutional remedies, this Court has shown "increasing solicitude for the interests and prerogatives of states." Developments in the Law: Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1135 (1977). *See, e.g., National League of Cities* v. *Usery*, 426 U.S. 833 (1976) (wages of state employees); *Rizzo* v. *Goode*, 423 U.S. 362 (1976) (misconduct of local police); *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974) (zoning ordinance).

[25] "[T]he authority to make . . . fundamental . . . decisions is perhaps the quintessential attribute of sovereignty." *National League of Cities* v. *Usery*, 426 U.S. 833, 851 (1974). The power to make decisions and set policy gives the states their sovereign nature. *Bates* v. *Arizona*, 433 U.S. 350 (1977). And "each State is sovereign within its own domain, governing its citizens and providing for their general welfare." *Federal Energy Regulation Commission* v. *Mississippi*, 72 L.Ed.2d 532, 558 (1982) (O'Connor, J., dissenting).

chase a stenographer's transcript in every case where a defendant cannot buy it. The [state] Supreme Court may find other means of affording adequate and effective appellate review to indigent defendants." *Id.* at 20. In other words, although Illinois was required by the Constitution to provide indigent defendants with reasonable access to the criminal appeals system,[28] this Court would not intrude into state affairs to the extent of mandating the particular way in which the constitutional infirmity must be remedied: "It is not for us to tell Illinois what means are open to the indigent and must be chosen. Illinois may prescribe any means that are within the wide area of its constitutional discretion." *Id.* at 24 (Frankfurter, J., concurring).

Similarly, this Court was careful to stress that the states (as well as the federal government) must give "Miranda warnings" if they wish to use statements stemming from custodial interrogation "unless other fully effective means are devised to inform accused persons of their right to remain silent." *Miranda* v. *Arizona*, 384 U.S. 436, 444 (1966). The court stressed that its concern was to deter violations of the Fifth Amendment, not to create and impose a particular remedial system as the exclusive method of insuring compliance:

> It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore, we cannot say that the Constitution necessarily requires adherence to any particular solution . . . . Our decision in no way creates a constitutional straightjacket which will handicap sound efforts to reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting effective enforcement of their criminal laws.

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[28] At least where Illinois had chosen to create such a system. *See McKane* v. *Durston*, 153 U.S. 684, 687-688 (1894).

Id. at 467.[27] Thus the court once again recognized that the states may try, if they wish, to create remedies which protect substantive constitutional rights, and yet are suited to the states' own individual preferences and needs.[28]

Such flexibility is possible because there is more than one way to achieve the important goal of preventing or deterring constitutional violations.[29] Unless an existing remedy is intended to have been exclusive, other alternative remedies are permitted.[30] For example, this Court has allowed a direct cause of action for damages to redress a violation of the Fourth Amendment, even though "other quite adequate remedies" may exist. *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 392-393 (1971) Black-

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[27] *See Michigan* v. *Tucker*, 417 U.S. 433, 444 (1974) (*Miranda's* "procedural safeguards . . . provide practical reinforcement for the right against compulsory self-incrimination.").

[28] *See New State Ice Co.* v. *Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see also Santosky* v. *Kramer*, 71 L.Ed.2d 599, 619 (1982) (Rehnquist, J., dissenting); *Johnson* v. *Louisiana*, 406 U.S. 356, 376 (1972) (Powell, J., concurring); *Chandler* v. *Florida*, 449 U.S. 560, 579 (1981); *Ker* v. *California*, 374 U.S. 23, 32 (1963).

> This state innovation is no judicial myth. When Wyoming became a State in 1890, it was the only State permitting women to vote. That novel idea did not bear national fruit for another thirty years. Wisconsin pioneered unemployment insurance, while Massachusetts initiated minimum wage laws for women and minors. After decades of academic debate, state experimentation finally provided an opportunity to observe no-fault automobile insurance in operation. Even in the field of environmental protection, an area subject to heavy federal regulation, the States have supplemented national standards with innovative and far-reaching statutes.

Federal Energy Regulation Commission v. *Mississippi*, 72 L.Ed.2d 532, 565-566 (1982) (O'Connor, J., dissenting) (footnotes omitted).

[29] *See Carlson* v. *Green*, 446 U.S. 14 (1980) (deterrence as major purpose of constitutional remedies). Deterrence is "precisely the proposition" underlying one of the best-known constitutional remedies, 42 U.S.C. § 1983. *Imbler* v. *Pachtman*, 424 U.S. 409, 442 (1976) (White, J., concurring).

[30] *Compare Parratt* v. *Taylor*, 68 L.Ed.2d 420 (1981) (declining to permit action under 42 U.S.C. § 1983 for minimal deprivation of property where state's system of tort remedies provides adequate redress and thus satisfies due process).

mun, J., dissenting).[31] Similarly, in *Carlson* v. *Green*, 446 U.S. 14 (1980), the spouse of a prisoner who allegedly died of medical neglect and mistreatment was allowed to pursue a constitutional remedy because the Federal Tort Claims Act was not intended to be exclusive. *Id.* at 19.

A state court has even more flexibility than a federal court to choose among alternative remedies, because the state may assume on its own initiative more extensive burdens than the constraints of federalism would permit a federal court to impose.[32] *See Harris* v. *Rivera*, 70 L.Ed.2d 530, 537 (1981) ("Constitution does not prohibit state judges from being excessively lenient"). In fact, a state may create remedial schemes which offer surer and more complete protection of federal constitutional rights.[33]

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[31] Indeed, the Court's conclusion was wholly independent of whether the state would prohibit or permit such an action. *Id.* at 392-393. Courts have also allowed direct actions under other provisions of the Constitution. *See, e.g., Davis* v. *Passman*, 442 U.S. 228 (1979) (Fifth Amendment); *Paton* v. *LaPrade*, 524 F.2d 862 (3d Cir. 1975) (First Amendment); *Berlin Democratic Club* v. *Rumsfeld*, 410 F. Supp. 144 (D.D.C. 1976) (Sixth Amendment); *Patmore* v. *Carlson*, 392 F. Supp. 737 (E.D. Ill. 1975) (Eighth Amendment); *Howard* v. *Warden*, 348 F. Supp. 1204 (E.D. Va. 1972) (Ninth Amendment), *app. dismissed*, 474 F.2d 1341 (4th Cir. 1973).

[32] Also, the Eleventh Amendment does not act as a limitation on remedies which a state court may adopt.

[33] *Griffin* v. *Illinois*, 351 U.S. 12 (1956), and *Miranda* v. *Arizona*, 384 U.S. 436 (1966), implicitly recognized that a state may elect to do more than provide just the minimum protection required by the Constitution. Other opinions of this Court suggest that it is desirable, in a federal system, for the states to do so. In *Crawford* v. *Los Angeles Board of Education*, 73 L.Ed.2d 948 (1982), the Court considered whether a state which had gone beyond the constitutional minimum to remedy segregation could subsequently withdraw its extra state remedies. "[C]ertainly the purposes of the Fourteenth Amendment would not be advanced by an interpretation that discouraged the States from providing greater protection to racial minorities." *Id.* at 957. Thus the Court not only presumed California could properly have provided the greater remedy but clearly believed it desirable that a state should do so as a matter of its own law. *See Palmer* v. *Thompson*, 403 U.S. 217, 228 (1971) ("locking in" state to more expansive remedy "would plainly discourage the expansion and enlargement of needed services in the long run.") (Burger, C.J., concurring).

Indeed, states will frequently adopt a remedial rule before the Court imposes it under the Constitution — sometimes even in the face of express pronouncements that the remedy is not constitutionally required. Despite the holding of *Wolf* v. *Colorado*, 338 U.S. 25 (1949), finding the states free to use evidence resulting from an illegal search and seizure, more than half the states had already adopted some form of exclusionary rule on their own initiative, and several states first adopted their exclusionary rule *after Wolf* held the rule was constitutionally unnecessary. *Mapp* v. *Ohio*, 367 U.S. 643, 651 (1961); *Elkins* v. *United States*, 364 U.S. 206, 219 (1960) (collecting state citations in Appendix, Table II, at 226-232). This Court did not object to individual states adopting procedural stafeguards that were beyond the minimum requirements of the Constitution as then interpreted; indeed, when *Mapp* v. *Ohio* finally extended the Fourth Amendment to the states through the Fourteenth, the Court "commended" California on its voluntary adoption of the exclusionary rule. *See Ker* v. *California*, 374 U.S. 23, 31 (1963).

Before *Gideon* v. *Wainwright*, 372 U.S. 355 (1963), finally overruled *Betts* v. *Brady*, 316 U.S. 455 (1945), more than thirty-five states were already "unnecessarily" providing counsel to indigent defendants in felony cases regardless of "special circumstances." *McNeal* v. *Culver*, 365 U.S. 109, 119-122 (1961) (appendix to concurring opinion of Douglas, J.). *See* Y. Kamisar, The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused, 30 U. Chi. L. Rev. 1, 17 (1962) (updating the *McNeal* data and surveying local *practice* in states that did not formally provide for assigned counsel in all felony cases, *id.* at 20 and 67-70).[34]

And even when federal law is imposed upon them, the states frequently retain at least some lawmaking authority. In

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[34] A more current example is that although this Court holds that the Constitution does not require appointment of counsel in cases where imprisonment is authorized but not actually imposed, a substantial number of states go further and assign counsel whenever a criminal sentence is possible. *Scott* v. *Illinois*, 440 U.S. 367, 386-388 & nn.18-22 (Brennan, J., dissenting) (1979).

determining the scope of remedies for violation of constitutional rights, this Court often looks to the law of the state in which the violation occurred. In *Robertson* v. *Wegmann*, 436 U.S. 584, 594 (1978), the Court incorporated state survivorship law to determine whether a § 1983 action was abated by the death of the plaintiff.[35] "Federal courts routinely refer to State law to fill the procedural gaps in national remedial schemes." *Carlson* v. *Green*, 446 U.S. 14, 29 (1980) (Powell, J., concurring).[36]

The conclusion is clear: although the states' remedial efforts may not lag behind constitutional requirements, they may well run ahead. That is not to say that the state courts may decide a case contrary to the underlying *substantive* mandates of the Constitution. *See Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n.6 (1981); *Oregon* v. *Hass*, 420 U.S. 714, 719 (1975).[37] In order to insure that the sub-

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[35] Similarly, this Court has found in the common law of torts the general rules for damages in constitutional torts, *Carey* v. *Piphus*, 435 U.S. 247, 257-258 (1978), and for immunities under § 1983, *Imbler* v. *Pachtman*, 424 U.S. 409, 417-419, 424 (1976), and has looked to the law of the forum state to determine the limitations period in suits brought in federal court under the Civil Rights Statutes, *O'Sullivan* v. *Felix*, 233 U.S. 318 (1914); *see also, e.g., Beard* v. *Stephens*, 372 F.2d 685, 688 (5th Cir 1967). 42 U.S.C. § 1988 instructs the courts "to look to the principles of the common law, as altered by state law," as the basis for remedies. *Moor* v. *County of Alameda*, 411 U.S. 693, 702-703 (1973); *Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1969).

[36] The proposition is even more familiar outside the constitutional sphere. *See, e.g., U.A.W.* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966); *Textile Workers of America* v. *Lincoln Mills*, 353 U.S. 448, 457 (1957); *DeSylva* v. *Ballentine*, 351 U.S. 570 (1956); *Reconstruction Finance Corp.* v. *Beaver County*, 328 U.S. 204 (1946).

[37] In *Hass*, the state court imposed greater "restrictions as a matter of *federal constitutional law* when this Court specifically refrained from imposing them." *Oregon* v. *Hass*, 420 U.S. 714, 719 (1975) (emphasis in original). *See also Fare* v. *Michael C.*, 442 U.S. 707, 717 (1979); *North Carolina* v. *Butler*, 441 U.S. 369 (1979). The case at hand is much different. The state court decision does not impose any restrictions; it simply adopts a remedy designed to decrease the likelihood of violations of an accepted constitutional norm. It is suggested that *Hass* not be extended so as to preclude all such remedial experimentation on the part of the states, particularly where there is no risk that a particular remedy "would cut this Court's holding[s] . . .

stantive command is heeded, however, the state may fashion a remedial rule to implement the constitutional requirement.[38] *See Katzenbach* v. *Morgan*, 384 U.S. 641 (1966) (Congress may adopt a more expansive remedy than the minimum required under the Equal Protection Clause). This flexibility afforded to the states is grounded in principles of federalism and in a practical recognition that in choosing among available alternatives (which is the essence of fashioning a remedy), a state is often in a better position to decide. The applicability of this general principle to the present case is discussed next.

B. *The Remedial System Adopted by the Supreme Judicial Court Reflects that Court's Greater Familiarity with Massachusetts Laws and Concerns.*

As a general matter, the courts sitting within a state are likely to be more familiar than this Court with the "legal and practical factors" affecting the state.[39] The state's highest

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completely loose from [their] explicitly stated rationale." *Beckwith* v. *United States*, 425 U.S. 341, 345 (1976).

Furthermore, *Hass* has not escaped criticism on the ground that the Constitution is "a fundamentally democratic document, open to competing interpretations" which may vary slightly from state to state, and a state should not necessarily be considered "in error" if it chooses to take a broader view of a constitutional provision. L. Tribe, *American Constitutional Law*, § 3-5 at 33 (1978).

[38] In some situations, the state's interest in creating its own remedial structure appropriately tailored to its own needs and circumstances will conflict with a countervailing federal interest. In these cases, federal law is supreme and will clearly prevail. See pp. 28-29, below.

[39] *See Upham* v. *Seamon*, 71 L.Ed.2d 725, 731 (1982) (greater familiarity of United States District Court); *City of Mesquite* v. *Aladdin's Castle, Inc.*, 71 L.Ed.2d 152, 162 (1982) (greater familiarity of Court of Appeals); *Webb* v. *Webb*, 68 L.Ed.2d 392, 399 (1982) (give state an opportunity to construe its own law authoritatively and to identify and satisfy any state interests); *Harrison* v. *NAACP*, 360 U.S. 167, 178 (1959) (look first to state court's interpretations "so that federal judgment will be based on something that is a complete product of the State, the enactment as phrased by its legislature and as construed by its highest court"); *Wisconsin* v. *Constantineau*, 400 U.S. 433, 439 (1971) (Burger, C.J., dissenting) (abstain to permit state courts to dispose of claim under state or federal Constitutions); *cf. Board of Education* v. *Pico*, 73 L.Ed.2d 435, 444 (1982) (general rule of

court is often in the best position to evaluate the potential of a particular remedy in preventing violations of constitutional rights.[40] In the present case, the extra familiarity of the Supreme Judicial Court with relevant Massachusetts law and policy concerns is not just a platitude of state judicial competence. The appellate courts of Massachusetts have vigorously sought to resolve many of the important (and often extremely complex) relationships between patients, providers and society.[41] *E.g.*, *Custody of a Minor*, 385 Mass. 697, 434 N.E.2d 601 (1982) (allowing potentially life-prolonging treatment to be withheld from terminally ill child); *In Re Moe*, 385 Mass. 555, 432 N.E.2d 712 (1982) (procedures for deciding whether to permit sterilization of incompetent woman); *Guardianship of Roe*, Mass. Adv. Sh. (1981) 981, 421 N.E.2d 40 (limiting forcible administration of antipsychotic drugs to noninstitutionalized ward); *In Re Spring*, Mass. Adv. Sh. (1980) 1209, 405 N.E.2d 115 (procedure for discontinuing medical therapy and mechanical support of incompetent patient); *Commissioner of Correction* v. *Myers*, 379 Mass. 255, 399 N.E.2d 452 (1979) (government may compel prisoner to submit to necessary medical treatment over his objections); *Custody of a Minor*, 375 Mass. 733, 379 N.E.2d 1053 (1978)

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deference to state and local authorities in management of local school affairs); *Larson* v. *Valente*, 72 L.Ed.2d 33, 59 (1982) (White, J., dissenting); *Santosky* v. *Kramer*, 71 L.Ed.2d 599, 621 n.4 (1982) (Rehnquist, J., dissenting) (important to look to full body of state law).

[40] *See, e.g.*, *People* v. *Cahan*, 44 Cal.2d 434, 445, 282 P.2d 905, 911-912 (1955) (noting the failure of remedies other than an exclusionary rule to secure police compliance with the Constitution); *see also* R. Traynor, *Mapp* v. *Ohio at Large in the Fifty States*, 1962 Duke L. J. 319, 321, 332 ("My misgivings about [illegally obtained evidence's] admissibility grew as I observed that time after time it has been offered and admitted as a routine procedure . . .. It had become all to obvious that unconstitutional police methods of obtaining evidence were not being deterred in any other way.").

[41] Many of the decisions have achieved national recognition, and some have generated substantial commentary. Whatever may be the merits of the relative approaches, Massachusetts has clearly insisted on a more active role for the state judiciary than many other jurisdictions in determining the appropriate balance between interests of patients and society. *Compare In re Quinlan*, 40 N.J. 10, 355 A.2d 647, *cert. denied sub nom. Gorger* v. *New Jersey*, 429 U.S. 922 (1976).

("Chad Green" case — state interest in protecting child's life overrides parents' preference for laetrile over chemotherapy); *Superintendent of Belchertown* v. *Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977) (authority of judiciary to implement incompetent patient's right to refuse treatment); *Commonwealth* v. *Golston*, 373 Mass. 249, 366 N.E.2d 744 (1977), *cert. denied*, 434 U.S. 1039 (1978) (determination of death via Harvard "brain death" criteria); *Baird* v. *Attorney General*, 371 Mass. 741, 360 N.E.2d 288 (1977) (right to abortion); *In Re Dinnerstein*, 6 Mass. App. Ct. 466, 380 N.E.2d 134 (1978) (interpretation and refinement of the doctrine of *Saikewicz*, *supra*); *Lane* v. *Candura*, 6 Mass. App. Ct. 377, 376 N.E.2d 1232 (1978) (competent patient's right to refuse life-saving treatment).[42]

In addition, Massachusetts has placed considered emphasis on the *government's* (as opposed to just the individual's) interest in adequate medical care for prisoners. In fact, the Supreme Judicial Court cited *Commissioner of Correction* v. *Myers*, 379 Mass. 255, 399 N.E.2d 452 (1979), where a prisoner was compelled to submit to kidney dialysis treatment because a contrary result would have undermined the legitimate institutional concerns of the prison. 385 Mass. at 778 ("[H]ad Kivlin refused the proffered care, he could have been compelled to submit to treatment"). For these same reasons, the Supreme Judicial Court may have felt reluctant to allow a municipality simply to deposit a critically injured detainee at the hospital, leaving the decisions of treatment and payment up to private parties, here the MGH and Kivlin. Although the perceived weight of a state's interest in such matters may well vary, Massachusetts' resolve to avoid any doubt or confusion in hospital emergency rooms should be respected.[43]

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[42] Presumably the state court was also mindful of Massachusetts' efforts to control hospital costs through state regulation. See Section V, below.

[43] Massachusetts also has a long tradition of concern for the rights of prisoners. The Eighth Amendment prohibition on "cruel and unusual punishment" was taken verbatim from the English Declaration of Rights of 1688. Even before that formal recognition of the prohibition in England, however, it had already appeared in Nathanial Ward's Massachusetts *Body of Liberties*

The Supreme Judicial Court began its analysis in this case with a detailed review of the state law of contract and *quantum meruit*. Only after concluding that Massachusetts law provided no basis for recovery under these theories did the court find it necessary to fashion a remedy to implement substantive constitutional rights.[44] Other states have found in their own laws different solutions to the same problem.[45] Just as this Court has often been reluctant to require states to adopt a specific, invariable approach to protect constitutional rights,[46] it should be still more hesitant to prevent an individual state from adopting whatever remedy the state finds most appropriate in light of its own needs and experiences.[47]

No federal law preempts the state's selection.[48] Nor is there a federal interest in a national law of prisoners or detainees

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(1641). Ward's formulation was incorported into the Massachusetts Code of 1648, and was repeated in the Colonial Laws of Massachusetts of 1660 and 1672. Note, 34 Minn. L. Rev. 134, 135-136 (1950).

The premise that Massachusetts has a strong interest in the well-being of its prisoners draws in another thread of state common law. Under Massachusetts law, parents have the duty to provide and guarantee adequate medical care for their children. *See Stimpson* v. *Hunter*, 234 Mass. 61, 125 N.E. 155 (1919). A provider of medical services can look to parents in the first instance, even though others may be ultimately liable.

[44] The Supreme Judicial Court presumably also recognized that, like the City of Boston, virtually all large Massachusetts municipalities (where most of these cases are likely to arise) already have public supported acute care hospitals capable of providing necessary medical services for detainees.

[45] *E.g.*, *Hospital Services, Inc.* v. *Duman*, 297 N.W.2d 320 (N. Dak. 1980); *Mt. Carmel Medical Center* v. *Board of City Commissioners*, 1 Kan. 2d 374, 566 P.2d 384 (1977); *Tulsa* v. *Hillcrest Medical Center*, 292 P.2d 430 (Okla. 1956); *Spicer* v. *Williamson*, 191 N. C. 487, 132 S.E. 291 (1926) (all under common law); *King County* v. *Seattle*, 70 Wash. 2d 988, 425 P.2d 887 (1967) (en banc) (statute); *but see Lutheran Medical Center* v. *Omaha*, 204 Neb. 292, 281 N.W.2d 786 (1979) (Eighth Amendment).

[46] See Section IV(A), above.

[47] Whatever consideration the Court might give to state fiscal constraints when imposing a remedy, *see, e.g.*, *Ross* v. *Moffitt*, 417 U.S. 600, 618 (1974), is irrelevant when the remedy is voluntarily adopted by the state.

[48] Even a conflicting federal law would displace state policies only to the extent of the actual conflict. *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978); *see Toll* v. *Moreno*, 73 L.Ed.2d 563, 588-589 (1982) (Rehnquist, J., dissenting); *cf.* M. Broad, Federal Common Law: Protecting State Interests, 37 Fed. Bar. J. 1 (1978).

that would require a uniform rule. *Compare Carlson* v. *Green*, 446 U.S. 14, 24 & n.11 (1980) (federal law determines survivorship of federal prisoner's action against prison officials) *with Robertson* v. *Wegmann*, 436 U.S. 584, 594 (1978) (state survivorship law applies to state prisoners).[49]

In the present case, Massachusetts has not violated any federal requirement or defaulted in its obligation to protect constitutional rights; rather, the state has been fully attentive in fashioning a remedial structure which effectively deters violation of those rights. In seeking to protect well established constitutional rights, the state court can also make and implement a policy determination that the costs of police protection, including the costs of caring for injured suspects in custody, should be borne by residents of the municipality rather than by patients of the hospital. The state's creation of a remedy appropriately tailored to its own policies and needs is entitled to substantial deference from this Court.[50]

V. Revere's Constitutional Obligation to Provide Necessary Medical Care for Detainees in its Custody Includes, at Least in the First Instance, the Obligation to Pay for That Care.

In the preceding sections of the brief, MGH has argued that this Court ought not review the merits of the state court's ruling in any detail, but should affirm the state's authority to structure an appropriate remedial system to protect constitutional rights or, in the alternative, should dismiss the writ of certiorari or vacate the judgment below and remand the case for clarification or further proceedings. The hospital now

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[49] *Compare also Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943), *with United States* v. *Yazell*, 382 U.S. 341 (1966).

[50] "As a sovereign entity, a State is entitled to assess its needs and decide which concerns of its citizens warrant its protection and intervention. I know of nothing — except the Constitution or overriding federal law — that might lead a federal court to superimpose its judgment for that of a State with respect to the substantiality or legitimacy of a State's assertion of sovereign interest." *Alfred L. Snapp & Son* v. *Puerto Rico*, 73 L.Ed.2d 995, 1011 (1982) (Brennan, J., concurring). *See Younger* v. *Harris*, 401 U.S. 37, 44 (1971), *quoted in Webb* v. *Webb*, 68 L.Ed.2d 392, 399 (1982).

demonstrates that even if the Court finds in the opinion below a determination of substantive constitutional rights rather than merely a creation of state procedures to implement rights already established, the judgment should be affirmed.

When the Constitution requires the government to take affirmative steps and provide a particular service, providing generally means paying for. Providing a trial transcript means paying for one if the appellant cannot do so. *See Griffin* v. *Illinois*, 351 U.S. 12 (1956). Providing counsel means paying if the defendant cannot. *See Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

Nowhere is this principle — the equation of provision of entitlements with payments — clearer than in the institutional litigation of which the present case is but one example. When courts have ordered the states to provide certain services to inmates or detainees as required by the Constitution, that means spending state money. Providing better medical care in a prison means actually providing the care, not just giving inmates an opportunity to purchase care themselves if they have the money or can find a provider willing to treat them. Were the rule otherwise, the prison and state institution cases would not repeatedly assert that a shortage of state funds or lack of legislative appropriation is no excuse for failing to provide the necessary care. *E.g.*, *New York State Association for Retarded Children* v. *Carey*, 631 F.2d 162 (2d Cir. 1980); *Todaro* v. *Ward*, 565 F.2d 48, 54 & n.8 (1977); *Costello* v. *Wainwright*, 525 F.2d 1239, 1252 (5th Cir. 1976); *Finney* v. *Arkansas Board of Correction*, 505 F.2d 194, 201-202 (8th Cir. 1974); *Wyatt* v. *Aderholt*, 503 F.2d 1305, 1313-1315 (5th Cir. 1974); *Gates* v. *Collier*, 501 F.2d 1291, 1319 (5th Cir. 1974); *Welsch* v. *Likins*, 373 F. Supp. 487, 499 (D. Minn. 1974); *see Watson* v. *City of Memphis*, 373 U.S. 526, 537 (1963).

The same equation of *providing* and *paying* underlies the Court's decision last term in *Youngberg* v. *Romeo*, 73 L.Ed.2d 28 (1982). In that case, Pennsylvania acknowledged its obligation to provide committed persons with adequate food,

shelter, clothing, and medical care;[51] this Court held that the Constitution required the state "to provide minimally adequate or reasonable training to insure safety and freedom from undue restraint." *Id.* at 39. In reaching this conclusion, the court was mindful of the potential fiscal impact on the state, *Id.* at 40; *see Parham* v. *J.R.*, 442 U.S. 584, 599-600 (1979), clearly showing again the expectation that the government would be paying for these services. Indeed, if "providing" did not mean "paying" it is doubtful the various governments would have opposed the relief sought in most of these cases.

This is not to say that the government must fund the exercise of every constitutional right. *Youngberg* v. *Romeo, supra*, 73 L.Ed.2d at 38. The government need not make Medicaid funds available for abortions because the state has no affirmative obligation to provide abortions, merely the duty not to interfere with a woman's right to arrange one for herself. *Harris* v. *McRae*, 448 U.S. 297 (1980). Here, by contrast, Revere had already assumed control of Kivlin by shooting him and placing him under arrest (A. 11, 13). *See United States* v. *Mendenhall*, 446 U.S. 544, 553-554 (1980). As a result, Revere did have an affirmative obligation to provide necessary medical care.[52]

Nor must the government in every case bear the ultimate, as opposed to the initial, responsibility for payment. This Court has already noted that many states make criminal defendants ultimately liable for the cost of representation provided at public expense, *James* v. *Strange*, 407 U.S. 128, 132-133 & n.8 (1972), or for the cost of trial transcripts in criminal appeals, *Rinaldi* v. *Yeagar*, 384 U.S. 305 (1966). Viewed this way, the remedial rules of *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), and *Griffin* v. *Illinois*, 351 U.S. 12 (1956), are only initial

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[51] *Id.* at 36-37 and 42. Twenty-one other states apparently agreed. *Id.* at 37 n.17.

[52] The government's obligation to its citizens is heightened when those citizens are in custody. *See, e.g., Abington School District* v. *Schempp*, 374 U.S. 203, 297 & n.72 (governments' provision of chaplains for prisoners) (*dicta*) (1963).

allocations of fiscal obligations,[53] not preventing the government from seeking reimbursement for its expenditures.[54] Nothing in the Supreme Judicial Court's opinion prevents Revere from seeking reimbursement from the detainee himself or third-party payors, if any.[55] *See Beach* v. *District of Columbia*, 320 F.2d 790, 793 (D.C. Cir. 1963) (secondary obligation on father to pay for incompetent child's treatment in public hospital).

When it imposed the initial obligation for payment upon the government, the Supreme Judicial Court no doubt recognized that pre-trial detainees as a class tend to be poor and might be expected to have less Blue Cross or private insurance

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[53] Although these cases only require government payment on behalf of indigent defendants, it is generally easier to make an accurate determination of indigency in the relative calm of an arraignment than in the excitement of a busy hospital emergency room or intake center Even if the Eighth or Fourteenth Amendments did not require that medical care he furnished without charge to non-indigent prisoners, *see Fant* v. *Fisher*, 414 F. Supp. 807 (W.D. Okla. 1976), constitutional rights will be most fully protected if the hospital is assured of payment from the municipality, with the municipality able to recover in turn from a solvent prisoner or detainee. *See United States* v. *Allen*, 596 F.2d 227 (7th Cir. 1979), *cert. denied*, 444 U.S. 871 (1979) (defendant who misrepresented his financial status ordered to reimburse government for costs of legal services).

Revere does not argue that the state court's decision is too broad because it requires initial payment without regard to indigency. Whether the Constitution requires the municipality to make initial payment in all instances need not be decided in this case. It may be, for example, that when a detainee clearly has sufficient resources, his financial status alone is sufficient guarantee that required medical treatment will be delivered. It should be noted here that in all likelihood Kivlin was indigent; Revere assumes as much by pointing to welfare programs which provide for needy persons (Pet. Br. 14).

[54] Revere implicitly recognized this fact when it filed its cross-claim against Kivlin for reimbursement. Revere also sued the Commonwealth of Massachusetts, claiming that ultimate financial responsibility lay there. Having failed to cross appeal the dismissal of this third-party claim, Revere is now in no position to complain if the ultimate burden in this case rests with it.

[55] Under Massachusetts law, the policeman escorting Kivlin to the hospital would not be *personally* liable for the costs of medical care. Mass. Gen. Laws c. 111C, § 14.

coverage.[56] By guaranteeing that the provider will be paid, the Supreme Judicial Court's rule insures prompt provision of necessary medical care.

Revere tries to shift its own constitutional obligation to provide care onto MGH by arguing that detainees will receive necessary medical attention regardless of payment. The argument is flawed in several respects. First, the "patient's rights" act on which Revere relies was not enacted until the year *after* Kivlin's hospitalization and thus does not apply. Mass. Gen. Laws c. 111, § 70E(k), added by St. 1979, c. 214.[57]

Moreover, the patient's rights statute refers only to emergency treatment, while the government's obligation extends to significant non-emergency treatment as well. See n.22, *supra*. "Many persons [in custody], such as diabetics, asthmatics, epileptics, hypertensives, and cardiacs, require daily medication or immediate access to medical attention at the onset of symptoms." E. Neisser, Is There a Doctor in the Joint: The Search for Constitutional Standards for Prison Health Care, 63 Va. L. Rev. 921, 939 (1977).

Revere also seeks to imply that MGH is required under the Hill-Burton Act, 42 U.S.C. § 291, and other federal funding statutes to provide free care to persons in Kivlin's position.

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[56] This Court has acknowledged reports of 50% to 90% indigency among felony defendants. *Miranda* v. *Arizona*, 384 U.S. 436, 472 n.40 (1966). The primary occupants of American jails are untried defendants too poor to purchase their freedom with bail. Note, Constitutional Limitations on the Conditions of Pretrial Detention, 79 Yale L. J. 941, 941 (1970). There are about 100,000 pretrial detainees in United States jails; depending on the jurisdiction, the average period of detention ranges from six weeks to eight months. *Id.* at 942. Massachusetts is in the middle of the range. *See Inmates of Suffolk County* v. *Eisenstadt*, 360 F. Supp. 676, 687 (D. Mass. 1973), *aff'd* 494 F.2d 1196 (1st Cir.), *cert. denied sub nom. Hall* v. *Inmates of Suffolk County Jail*, 419 U.S. 977 (1974) (two to six months or more at Charles Street Jail — where Revere brings its detainees, A. 14).

[57] Because this statute was not raised below and this provision of the statute has never been interpreted by the state supreme court, this Court should in any case decline to base its decision on that ground. It is for the Supreme Judicial Court to say whether the remedy applied in the next case should be changed in light of the legislative action. *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496, 500 (1941).

Because this claim was never raised in the state courts, MGH presented no evidence on the issue, but now represents to this Court that the hospital's Hill-Burton obligations had been fulfilled before Kivlin's hospitalization and that MGH had no obligation to provide such care pursuant to any federal enactment.[58] What Revere fails to mention is the tremendous financial pressure that has been brought to bear on Massachusetts hospitals. Massachusetts is one of the few states to regulate directly hospital charges. Mass. Gen. Laws c. 6A, §§ 37-46, instructs the state's Rate Setting Commission to fix the rates paid to providers.[59] In addition, since 1980 special statutory enactments have established overall ceilings on a hospital's total revenue increases. *See* Mass. St. 1980, c. 540; St. 1981, c. 432; and St. 1982, c. 372. Taken together, the two sets of laws restrict a hospital's ability to raise its rates or to increase its total revenues.[60]

Because of these statutes, MGH anticipates revenue of approximately $17 million less than its projected need for the

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[58] The federal government takes the position that Medicare payments "may not be made for items or services rendered to prisoners, since the state (or other government component which operates the prison) is responsible for their medical and other needs. For this purpose, the term 'prisoner' means a person who is in the custody of the police, penal authorities, or other agency of a governmental entity." Department of Health and Human Services (Health Care Financing Administration), Medicare Hospital Manual § 260.3 (Aug. 10, 1982), also appearing in CCH, Medicare and Medicaid Guide § 4050, at p. 1419 (Nov. 1982).

Similarly, Medicaid is not available for inmates. 42 C.F.R. §435.1008(a)(l), § 435.1009. See L. King, *Public Police and Administrative Aspects of Prison and Jail Health Services*, reprinted in A.C.L.U. National Prison Project, *Representing Prisoners*, at 377 n.10 (1981) (noting exclusion of jail and prison health service from public and private reimbursement programs). Even without these exclusions, of course, a prisoner will not be eligible for Medicare or Medicaid unless he satisfies the particular requirements of the program.

[59] The rates thus set are *maximum* charges; only commercial insurance carriers and self-pay patients pay charges. Reimbursement under Medicaid, Medicaid and Blue Cross is lower.

[60] If adopted, proposed regulations of the Department of Health and Human Services curtailing compensation for the services of "physicians practicing in the institutional setting" will exacerbate the fiscal problem. See 47 Fed. Reg. 43578 *et seq.* (Oct. 1, 1982).

current fiscal year.[61] As a result MGH, like most Boston area hospitals, has had to take drastic action to deal with the anticipated shortfall. The hospital adopted a budget reduction program, including a self-imposed hiring freeze effective July 26, 1982, pursuant to which new personnel may not be hired and vacant positions may not be filled without special permission of the newly created Resource Allocation and Position Review Committees. The hospital eliminated its traditional policy of providing annual raises on employees' service anniversary dates. And MGH is currently in the process of revising its free care policy to reduce the circumstances in which it will provide medical services without regard to ability to pay.

For all these reasons, it cannot be asserted with any confidence that Massachusetts prisoners and detainees will automatically receive all necessary hospital care regardless of financial resources. Governmental policies are forcing Massachusetts hospitals to reevaluate all their services, and their free services most of all.[62] In the present financial climate, it is reasonable to expect that many hospitals in the state will decline to provide free care whenever possible. As Revere demonstrates by its position in this litigation, hospitals in Massachusetts cannot rely on municipalities to pay voluntarily for treatment provided to detainees.[63]

Under these circumstances, the rule adopted by the Supreme Judicial Court is an important step toward protecting the constitutional rights of those in custody. Other possible prisoners' remedies, such as tort damages or habeas corpus,

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[61] This estimate assumes essentially no expansion of hospital services, since in most cases the revenue cap prevents the hospital from increasing its aggregate revenues enough to cover the added cost of new services.

[62] Because of the revenue cap, an increase in free care will not be reimbursed by the third-party charge payors.

[63] Any fiscal constraints imposed on Revere by St. 1980, c. 580 ("Proposition 2½") may be overridden by vote of the City's residents. The Massachusetts "revenue cap," by contrast, does not permit an override by the hospitals. Although Revere makes no showing that an override would be needed, the City has in any case no right to be free of costs of insuring that constitutional rights are respected. *City of Monell* v. *Department of Social Services*, 436 U.S. 658 (1978).

are inadequate because they are available only *after* a failure to provide treatment has occurred. The ultimate goal of the Fourteenth Amendment is to prevent constitutional violations from occurring, not merely to provide monetary redress after the fact. *See Parratt* v. *Taylor*, 68 L.Ed.2d 420, 435 (1981) (Blackmun, J., concurring) (greater concern over deprivations of life and liberty); *Wyatt* v. *Aderholt*, 503 F.2d 1305, 1316 (5th Cir. 1974) (Wisdom, J.).

The remedial rule adopted by the Supreme Judicial Court also has the virtue of simplicity. This Court has on occasion felt the burden of "recurrent inquiry into special circumstances" of individual cases. *Miranda* v. *Arizona*, 384 U.S. 436, 469 n.38 (1966); *Scott* v. *Illinois*, 440 U.S. 367, 378 (1979) (Brennan, J., dissenting). Where the right is as important as physical well-being and the remedy as simple as the one adopted here, there is no excuse for choosing instead to engage in *ex post facto* inquiry into the detainee's medical needs and his financial situation. *See Miranda* v. *Arizona*, *supra* at 373 n.43.

Conclusion.

If this Court reaches the question of constitutional interpretation, it should hold that the Constitution requires municipalities to bear in the first instance the costs of necessary medical care for detainees to insure the care is in fact provided. Alternatively, the Court should not disturb the state's allocation of fiscal responsibility for costs of medical care furnished to pre-trial detaineees because the state remedy is a permissible one under the Constitution.

Indeed, the Court should decline to reach the merits because the Supreme Judicial Court's choice of remedy to deter constitutional violations is a matter of state law not properly reviewable by the federal courts. If the Court is concerned that the federal and state law may be intertwined in the decision below, it should find that Revere has not met its

burden of establishing the existence of a fundamental federal question or should remand the case to permit clarification and further action by the Supreme Judicial Court.

The Court need not consider any of these questions, however, for Revere is a creature of the state and thus is not a proper party to challenge fiscal obligations assigned to it by the state. And although MGH believes it is a proper party to assert the rights of detainee patients to necessary medical care, if this Court disagrees and concludes that the federal rules of standing are not satisfied, it should dismiss the writ of certiorari rather than impose the federal rules upon the states.

Respectfully submitted,

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No. 82-63.

In the
Supreme Court of the United States.

OCTOBER TERM, 1982.

CITY OF REVERE,
PETITIONER,

v.

MASSACHUSETTS GENERAL HOSPITAL,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Reply Brief for Petitioner.

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Reply Brief for Petitioner.

Argument.

I. WHETHER A MUNICIPALITY HAS A CONSTITUTIONAL OBLIGATION TO FUND THE COSTS OF MEDICAL TREATMENT OF AN INJURED SUSPECT IS A SUBSTANTIAL FEDERAL QUESTION AND THEREFORE, THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT OF THE SUPREME JUDICIAL COURT.

In its brief, respondent Massachusetts General Hospital ("MGH") contends that this Court lacks jurisdiction to review

the judgment of the Supreme Judicial Court.[1] Characterizing the Supreme Judicial Court's holding as a remedial rule to implement "accepted constitutional norms," MGH suggests that only state law issues are involved, that no substantial federal question is presented to this Court for review, and that independent and adequate state law grounds support the holding below. These contentions have no merit in this case.

It is settled that this Court's power over state court judgments is limited to correcting errors in the adjudication of federal rights and that the burden is on the petitioner city of Revere ("Revere") to establish the existence of a federal claim. See, *e.g.*, *Webb* v. *Webb*, 451 U.S. 493, 495-497 (1981); 28 U.S.C. § 1257. Similarly, the federal claim must be a substantial one and must have been properly raised in the state courts. *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955); *Parker* v. *Illinois*, 333 U.S. 571, 574-575 (1948); *Cardinale* v. *Louisiana*, 394 U.S. 437, 438 (1969). Finally, there cannot be an adequate and independent state law ground upon which the decision rests, otherwise resolution of the federal claim "could amount to nothing more than an advisory opinion." *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977), quoting from *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945). Notwithstanding MGH's novel construction of the opinion below, this Court may safely review the holding of the Supreme Judicial Court consistent with these principles.

First, the Supreme Judicial Court clearly based its ruling on a federal claim, arising solely under the United States Constitution.[2] As the Supreme Judicial Court stated, 385 Mass. at 774, 434 N.E.2d at 1865, A. 24:

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[1] See Res. Br. at 10-12.

[2] Although the Supreme Judicial Court noted that the Massachusetts Constitution, Article 26 of the Declaration of Rights, also contains a prohibition against "cruel and unusual punishments," the court declined to consider this provision since MGH did not raise or argue it. 385 Mass. at 776 n.6, 434

> The hospital claims, both on contractual and constitutional grounds, that Revere is obligated to pay for the necessary medical services provided to Kivlin. While there is no contractual basis for recovery, ***we hold that the constitutional prohibition against cruel and unusual punishment, embodied in the Eighth Amendment to the United States Constitution, requires that Revere be liable*** to the hospital for the medical services rendered to Kivlin during his first stay at the hospital. . . . (Emphasis added.)

On no fewer than five occasions later in its opinion, the Supreme Judicial Court reiterated that Revere's duty to reimburse MGH was constitutionally mandated. The opening sentence in the section of the court's opinion on the Eighth Amendment leaves no doubt as to the source of Revere's liability. As the Supreme Judicial Court stated, 385 Mass. at 776, 434 N.E.2d at 187-188, A. 26:

> The hospital argues that the prohibition against deliberate indifference to the medical needs of prisoners contained implicitly in the Eighth Amendment, *Estelle* v. *Gamble*, 427 U.S. 97 (1976), *compels a government agency* or division responsible for supplying those medical needs *to pay for them*. We agree. (Emphasis added and footnotes omitted.)[3]

N.E.2d at 187-188 n.6, A. 26. MGH was content, perhaps, to rely on the United States Constitution since the full text of Article 26 reads as follows: "No *Magistrate* or *court of law*, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments." (Emphasis added.) *Cf.*, *Ingraham* v. *Wright*, 430 U.S. 651, 664 (1977).

[3] That the constitutional obligation included *funding*, as well as a duty to *provide* medical care, can be seen by the court's rejection of Revere's monetarily based concerns. ("That funds may not have been appropriated for this purpose is no excuse, because inadequate funding will not excuse deprivation of rights guaranteed by the Constitution." 385 Mass. at 779, 434

Second, there can be no doubt that whether the constitution itself imposes an affirmative funding obligation on government is a substantial issue. Compare, *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, *supra*, and *Zucht* v. *King*, 260 U.S. 174, 176 (1922). The Supreme Judicial Court's determination that the Eighth Amendment contained such a duty to pay conclusively establishes that the question was properly raised in the state court. See, *Payton* v. *New York*, 445 U.S. 573, 582 n.19 (1980); *Raley* v. *Ohio*, 360 U.S. 423, 436 (1959). Similarly, it cannot be claimed that this issue is wholly devoid of merit or is otherwise plainly foreclosed by prior opinions of this court. See, *Equitable Life Assurance Society* v. *Brown*, 187 U.S. 308, 311 (1902). Therefore, the writ of certiorari granted in this case need not be dismissed as improvidently granted for want of a substantial federal question. See, *Duncan* v. *Tennessee*, 405 U.S. 127 (1972); *Palmer Oil Corp.* v. *Amerade Petroleum Corp.*, 343 U.S. 390 (1952).

Finally, there can be no doubt that there is no adequate and independent state ground upon which the judgment below could be upheld.[4] On the contrary, there can be no adequate and independent state law basis for the ruling since the Supreme Judicial Court itself held that it would be *illegal* under state law for Revere to pay MGH in this case for the costs of Kivlin's care.

Massachusetts, unlike other states, insists upon strict compliance with all statutory requirements prior to allowing any

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N.E.2d at 189, A. 29.) (See also n.10, 385 Mass. at 779, 434 N.E.2d at 189, A. 29: "The *result* that we reach *under the constitutional banner* is entirely consistent with the legislative policy toward prisoners." (Emphasis added).)

[4] Indeed, MGH can point to no specific statute, Massachusetts rule or common law principle upon which the ruling below could be based. MGH merely — and perhaps hopefully — speculates that the Supreme Judicial Court's ruling can be read "as fashioning a state remedy." Res. Br. at 14.

form of contractual recovery against a municipality.[5] This strict rule prevents recovery unless the municipality was authorized to make the contract,[6] the contract was made by a duly authorized agent of the municipality,[7] and the municipality complied with all statutory formalities required for the making of contracts.[8] In the absence of complete adherence to these rules, no form of contractual recovery, either on an express contract, an implied contract, or on a quantum meruit theory, is permissible under the law of the Commonwealth. See, *Central Tow Co.* v. *Boston*, 371 Mass. 341 (1976); *Adalian Bros.* v. *Boston*, 323 Mass. 629 (1949).[9]

Therefore, there need be no doubt that no adequate and independent state ground supports the judgment below since no

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[5] Compare *Massachusetts General Hospital* v. *Revere*, 385 Mass. at 774-776, 434 N.E.2d at 186-187, A. 24-26 with 1A C.J. Antieau, Municipal Corporation Law, § 10.01 (1982 ed.).

[6] *Lord* v. *Winchester*, 355 Mass. 788 (1969).

[7] *Richard D. Kimball Co.* v. *Medford*, 340 Mass. 727 (1960).

[8] *Urban Transport, Inc.* v. *Mayor of Boston*, 373 Mass. 693 (1977) and cases cited.

[9] The Supreme Judicial Court has even refused to mitigate the harshness of these rules by adopting exceptions based upon equitable estoppel or similar principles. Rather, the Massachusetts rule is that estoppel may not be invoked against a local government or a local official. See, *e.g.*, *Doris* v. *Police Commissioner of Boston*, 374 Mass. 443, 449 (1978) and cases cited.

Similarly, the Supreme Judicial Court has recognized that these rules often produce extremely harsh results. The importance to the public of preventing unauthorized and uncontrolled municipal spending, however, has outweighed the interest of the private party. As the Supreme Judicial Court stated after denying recovery to the plaintiff in *Richard D. Kimball Co.*, *supra*, 340 Mass. at 732: "This is a harsh result, as there is no suggestion that the plaintiffs did not fully and faithfully perform the services requested of them. But, as we said earlier, one who contracts with a municipality can recover only if the statutory safeguards governing its contracting powers are satisfied. Any other rule, however appealing it may be in an individual case, would in the long run render such safeguards worthless; it would be another instance of a hard case making bad law."

such law exists.[10] Compare, *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 292-295 (1982). The Supreme Judicial Court recognized this conflict between state law and its interpretation of federal constitutional requirements and specifically and properly ruled in favor of the supremacy of federal law.[11] Citing *Smith* v. *Sullivan*, 611 F.2d 1039, 1043-1044 (5th Cir. 1980), the Supreme Judicial Court stated, "Further, that such payment [Revere to MGH] may be a violation of state or local law will not avail Revere of any relief from the payment." *Massachusetts General Hospital* v. *Revere*, 385 Mass. at 779, 434 N.E.2d at 189, A. 29. The Supreme Judicial Court could hardly be said to have fashioned a state law rule in conflict with its own law.

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[10] In fact, there is a strong argument that the interpretation urged by MGH would be unconstitutional under the Massachusetts Declaration of Rights. If, as MGH suggests, the Supreme Judicial Court simply adopted *as state law* the rule that cities and towns pay hospitals for emergency medical treatment rendered to criminal suspects, such a ruling might run afoul of the state doctrine of separation of powers. Under Article 30 of the Massachusetts Declaration of Rights, "In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them. . . . The judicial shall never exercise the legislative and executive powers, or either of them. . . ." Aside from the other difficulties under state law with MGH's suggested state law remedy, a judicially ordered spending rule, such as the one in this case, could well run afoul of Art. 30. See, *Moe* v. *Secretary of Administration & Finance*, Mass. Adv. Sh. (1981) 464, 476-477 and cases cited.

[11] Notwithstanding this conflict, MGH purports to find support for its theory of the state created "implementing rule" by the absence of any statement in the decision that it was *compelled* by federal law. See Res. Br. at 14 n.19 citing *Commonwealth* v. *Sheppard*, 387 Mass. 488, 489 (1982). The statement in *Sheppard* that MGH cites, however, prompted two justices to write separate opinions critical of the majority's "grudging acceptance" of the controlling federal rulings. *Commonwealth* v. *Sheppard*, 387 Mass. 488, 509 (Liacos, J., concurring). There can be little doubt that in this case the Supreme Judicial Court fully endorsed the federal rule it created.

Rather than fashioning a state law remedy, the Supreme Judicial Court's decision that Revere must reimburse MGH for the cost of the medical treatment rendered was compelled by its erroneous interpretation of the United States Constitution. This Court, then, has jurisdiction under 28 U.S.C. § 1257(3) to review and correct the judgment of the Supreme Judicial Court.

II. The Issue of MGH's Standing is Subject to Review in This Court.

MGH contends that the issue of its standing to raise the constitutional rights of others may not be reviewed by this Court. MGH's argument rests on two grounds: (1) as a matter of state law, MGH maintains that Revere waived the standing issue in the court below; and (2) if not waived below, then there is no jurisdiction to raise the standing issue in this Court since it is a matter of state, not federal law. While MGH's argument has merit in the abstract, the principles upon which MGH's assertions rest have no application to this case.

Had the Supreme Judicial Court simply treated the issue of standing as waived, this Court's review would be limited.[12] See, *Parker* v. *Illinois*, 333 U.S. 571, 574-575 (1948); *Wood* v. *Georgia*, 450 U.S. 261, 265 (1981); see also, *Vachon* v. *New*

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[12] Revere would nonetheless have a strong argument that the procedural rule ought not to bar review of the standing issue. In issuing its ruling that the Eighth Amendment itself contained a guarantee that MGH would be paid, the court went beyond any assertion advanced by MGH. Rather, MGH had merely argued in its brief that the constitution created a *duty* on the part of Revere to provide medical care. The obligation to pay arising from this duty was still an obligation created under state law. *Cf., Lutheran Medical Center* v. *City of Omaha*, 204 Neb. 292, 281 N.W.2d 786 (1979). Under these circumstances, Revere is not foreclosed from raising the standing issue in this Court by its alleged waiver below.

Hampshire, 414 U.S. 478 (1974). However, the Supreme Judicial Court, while noting its rule of appellate practice providing for waiver of issues not briefed, proceeded to decide the question. See 385 Mass. at 776-777 n.7, 434 N.E.2d at 188 n.7, A. 26-27. Having decided the question, even though it was not bound to do so, the Supreme Judicial Court's ruling is now subject to review in this Court. See *WHYY, Inc.* v. *Borough of Glassboro*, 393 U.S. 117, 119 (1968).

Similarly, the Supreme Judicial Court decided the standing issue as a matter of federal, not state law. The applicable standard was taken from *Barrows* v. *Jackson*, 346 U.S. 249 (1953). As additional authority, the Supreme Judicial Court cited a treatise on the *federal* courts. Although the Supreme Judicial Court could have applied its own rules of standing, it chose not to do so. Therefore, state law rules do not prevent this Court from reviewing the decision below on the merits, *Orr* v. *Orr*, 440 U.S. 268, 277 (1979), and the rule of *Doremus* v. *Board of Education*, 342 U.S. 429 (1952) is inapposite.

III. The Constitution Imposes No Affirmative Obligation on Revere to Reimburse MGH for the Costs of Emergency Medical Treatment.

MGH's argument in support of the judgment below on the merits is based upon three claims: First, MGH asserts that the suspect was under arrest by Revere police and therefore ought to be classified as a "pre-trial detainee."[13] Second, as a pre-trial detainee, the suspect, according to MGH, was entitled as a matter of constitutional law to have Revere supply him with necessary medical care.[14] Finally, since Revere was obligated

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[13] See Res. Br. at 31-32.

[14] See Res. Br. at 10 n.11.

to *provide* medical care, it was also obligated as a matter of constitutional law *to pay* in the first instance for the care ultimately provided.[15] This equation cannot withstand scrutiny in light of applicable constitutional standards.

At the outset, it is essential to analyze the constitutional interests at stake in this case. Notwithstanding MGH's assertion to the contrary, any affirmative duty to provide medical treatment can only arise from the specific constitutional guarantee that creates this duty. For example, in *Estelle* v. *Gamble*, 429 U.S. 97 (1976), the state's duty to provide medical care arose only as necessary to prevent the infliction of cruel and unusual punishment, a punishment that would exist by permitting "unnecessary suffering" for no "penological purpose." *Id.* at 103. Similarly, an institutionalized person, not convicted of any crime, would be entitled to adequate medical care and other conditions of confinement consistent with the detainee's liberty interest and to prevent the imposition of punishment. See *Youngberg* v. *Romeo*, ___ U.S. ___, 102 S.Ct. 2452, 2459 (1982); *Bell* v. *Wolfish*, 441 U.S. 520, 535 (1979). Neither *Estelle*, *Youngberg*, nor *Bell* mandate a constitutional right to medical care; rather, medical care is the means to prevent cruel (or punitive) conditions of confinement.

Similarly, the injured suspect in this case possessed no independent constitutional right to medical care. Instead, the suspect enjoyed at most a "liberty" interest in being free from the infliction of punishment that would have come from leaving him helpless and his injuries untreated. Revere vindicated these "liberty" interests by securing an ambulance to transport the suspect to MGH. Therefore, in the context of this case, MGH is incorrect is asserting the suspect had an independent constitutional right to have Revere supply him with free medical care.

MGH's argument also breaks down when it characterizes the suspect as a "pre-trial detainee." Rather, it is important to

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[15] See Res. Br. at 30-31.

recognize that the fact-pattern in this case concerns an on-the-street injury, not the medical needs of an institutionalized prisoner. As such, Revere's "custody" of the suspect's body amounts to little more than legal fiction.[16] Aside from having inflicted the injury in this case,[17] Revere's association with the suspect is no different than its relationship with any other citizen suffering from an emergency, on-the-street injury.

Finally, MGH incorrectly equates providing with paying, at least as to the "initial responsibility" for the costs of medical care.[18] In fact, the only time this equation succeeds is when

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[16] As the Supreme Judicial Court intimated, the concept of "custody" is an elusive one. As the court stated, "That a person is 'in custody' for one purpose does not make him 'in custody' for all purposes. The logic of the . . . proscription of indifference to serious medical needs of prisoners extends only to those in physical custody." 385 Mass. at 780 n.11, 434 N.E2d at 190 n.11, A. 30. Presumably then, under the Supreme Judicial Court's formula, a person would have to be either a prisoner or "under arrest" to be entitled to free medical care and the petitioners in *Jones* v. *Cunningham*, 371 U.S. 236 (1963) and *Hensley* v. *Municipal Court*, 411 U.S. 345 (1973) would be ineligible. See 385 Mass. at 778, 434 N.E.2d at 188-189, A. 28.

The arrest criterion, however, has many logical shortcomings. It excludes all persons involved in custodial interrogations. See *Miranda* v. *Arizona*, 384 U.S. 436 (1966). It excludes all persons stopped by police merely for investigative purposes, either on the street, *Terry* v. *Ohio*, 392 U.S. 1 (1908), in a car, *Delaware* v. *Prouse*, 440 U.S. 648 (1979), or in another public place. See *United States* v. *Mendenhall*, 444 U.S. 544 (1980). It would also exclude the petitioners in *Hurtado* v. *United States*, 410 U.S. 578 (1973). The inability to distinguish these cases from the Supreme Judicial Court's rule demonstrates the faulty reasoning involved. Limiting medical care to detainees at custodial institutions, however, creates no such logical difficulties.

[17] This fact, however, is not pertinent to MGH's argument or the reasoning of the court below. The suspect's injuries — had they been self-inflicted or suffered at the hands of a cohort — would still have required treatment, medical care for which the Supreme Judicial Court and MGH would hold Revere liable to pay.

[18] See Res. Br. at 30. The Supreme Judicial Court however makes no reference whatsoever to "initial" responsibility.

the recipient of the service is indigent. Thus, the rule of *Griffin* v. *Illinois*, 351 U.S. 12 (1956) and *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) applies only to indigents.[19]

MGH's argument, therefore, applies an incorrect constitutional standard to the wrong person in an inappropriate setting. Rather than being constitutionally required to provide free medical care to the injured suspect, Revere's duty was to prevent a deprivation of liberty as a result of an inability to secure necessary medical attention. This right was fully vindicated in this case. Neither the Eighth Amendment nor the Fourteenth Amendment requires Revere to do more by reimbursing MGH for the cost of the medical care that was ultimately rendered.

Conclusion.

For all of the foregoing reasons, MGH's arguments that this Court lacks jurisdiction, that the issue of MGH's standing cannot be reviewed, and that Revere is obligated by the constitution to guarantee free medical care to injured suspects, are without merit. Revere respectfully requests that this Court grant the relief sought by petitioner in its brief on the merits.

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[19] In this case, the record is devoid of any evidence that the suspect was indigent or otherwise unable to pay for treatment.

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No. 82-63.

In the Supreme Court of the United States.

OCTOBER TERM, 1982.

CITY OF REVERE,
PETITIONER,

v.

MASSACHUSETTS GENERAL HOSPITAL,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Brief of Amici Curiae, American Civil Liberties Union, Civil Liberties Union of Massachusetts, and Massachusetts Correctional Legal Services.

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Argument 7

The judgment below should be vacated and the case remanded because (1) this Court lacks the benefit of a lower court opinion applying the correct legal standard, (2) the factual record is inadequate to resolve the constitutional question presented, and (3) a recent state statute of which the lower court was unaware may obviate the need for constitutional adjudication.

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NO. 82-63
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BRIEF OF AMICI CURIAE, AMERICAN CIVIL LIBERTIES UNION, CIVIL LIBERTIES UNION OF MASSACHUSETTS, AND MASSACHUSETTS CORRECTIONAL LEGAL SERVICES

Interest of Amici*

The amici are organizations committed to the protection of civil liberties, including the right to medical treatment for those in police custody. Ordinarily, the question of how these services are financed is one that raises no civil liberties concerns, so long as the individual right to medical treatment is respected and guaranteed. There may be cases, however, where effective preservation of the right to treatment demands that the costs be imposed on the city or town. There may also be cases where, because of constitutional violations committed by the city or town,

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*Letters from the parties consenting to the filing of this brief have been lodged with the Clerk.

consequential costs should rightly be imposed on them. In these circumstances, due process may well require a city or town to pay for medical treatment of a suspect in its custody.

Whether or not this is such a case is totally unclear. The liability issue is presented here only in the most abstract and theoretical form, without benefit of a lower court opinion on point or a developed factual record. Because amici are concerned with preserving the underlying right to medical treatment, and because it is virtually impossible to be certain on this record of the extent to which that right requires funding by the city in this or any other case, we urge this Court to remand this case to the Massachusetts Supreme Judicial Court for

reconsideration under the appropriate legal standard and for the development of a needed factual record.

Summary of Argument

This Court has long adhered to a policy of "strict necessity" in adjudicating constitutional claims, refusing to resolve constitutional questions which have not been properly developed below or whose resolution may not be necessary to dispose of the case. In the court below, this case was briefed, argued, and decided as an eighth amendment cruel and unusual punishment case; this Court's decisions mandating scrutiny under the due process clause of the fourteenth, rather than the eighth, amendment were never mentioned. A remand would afford

the state court the opportunity -- its first -- to pass on the fourteenth amendment claim, and would provide this Court with the benefit of a lower court opinion on point before it decides important constitutional questions.

A remand is necessary in any event to develop the factual record. Even were this Court tempted to reach the merits of the fourteenth amendment claim, the factual record appears inadequate on its face for the required inquiries. There is simply nothing in the record relating to critical issues such as whether and when payment may be necessary to secure treatment, and whether the city was responsible for the injury through the use of excessive force. As a result, any constitutional inquiry at this stage

must take place almost entirely in the abstract, and at least some conclusions of such an inquiry may turn out to be purely advisory.

Finally, a remand may alter the nature of the constitutional inquiry, or even eliminate the necessity of it altogether. Subsequent to the events at issue in this case, Massachusetts enacted a new statute governing the provision of emergency medical care by hospitals in the state. That statute at least arguably ensures medical care without regard to ability to pay, and therefore may answer the question whether municipal liability is essential to ensure treatment, which has been the gravamen of the hospital's argument. A remand would allow the Massachusetts

court to rule on the impact of the new statute.

ARGUMENT

THE JUDGMENT BELOW SHOULD BE VACATED AND THE CASE REMANDED BECAUSE (1) THIS COURT LACKS THE BENEFIT OF A LOWER COURT OPINION APPLYING THE CORRECT LEGAL STANDARD, (2) THE FACTUAL RECORD IS INADEQUATE TO RESOLVE THE CONSTITUTIONAL QUESTION PRESENTED, AND (3) A RECENT STATE STATUTE OF WHICH THE LOWER COURT WAS UNAWARE MAY OBVIATE THE NEED FOR CONSTITUTIONAL ADJUDICATION.

This case was briefed, argued, and decided below as a case about the requirements of the cruel and unusual punishment clause of the Constitution. The disagreement between the city and the hospital centered on the question of when the protections of the eighth amendment are triggered: the hospital asserted that the amendment applied to

all those within police custody, while the city claimed that incarceration, rather than custody, was the trigger. The court held for the hospital, concluding that custody, rather than incarceration, triggered the protection of the eighth amendment and that the protection included an obligation on the municipality to pay for needed medical treatment.

The question of when the eighth amendment's protections are triggered is one which had previously been resolved in a quite different manner by this Court's decisions in Bell v. Wolfish, 441 U.S. 520 (1979) and Ingraham v. Wright, 430 U.S. 651 (1977):

> Eighth amendment scrutiny is appropriate only after the State has complied with the

> constitutional guarantees traditionally associated with criminal prosecutions. See United States v. Lovett, 328 U.S. 303, 317-318. . . .[T]he state does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law. Where the state seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment. Ingraham v. Wright, 430 U.S. 651, 672 n. 40 (1977).

Thus, in Bell v. Wolfish, supra, this Court held that the conditions of detention of those who were both in custody and incarcerated, but had not been tried or convicted, should be judged not under the standard of the eighth amendment, but rather of the due process clause of the fourteenth amendment.

The City of Revere now argues that the lower court decision imposing on

it, under the eighth amendment, an obligation to pay for the medical treatment of a suspect in its custody is flatly inconsistent with Bell and Ingraham. But it cited neither case to the court below, and that court proceeded in apparent ignorance of this Court's controlling holding. The Massachusetts Supreme Judicial Court has yet to apply the appropriate fourteenth amendment standard and rule on the separate due process claim.*

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*It cannot be assumed that the state court's analysis under the fourteenth amendment would inevitably track its analysis under the eighth amendment. To be sure, there would seem to be little question that the fourteenth amendment protects those in custody prior to trial at least against the deliberate indifference to their medical needs which the eighth amendment, as construed by this Court in Estelle v. Gamble, 429 U.S. 97 (1976), prohibits as to convicted offenders; indeed, the protection may in fact be broader where no conviction justifies punishment. Cf. Youngberg v. Romeo, 102 S.Ct. 2452 (1982).
(cont'd)

In similar circumstances, this Court has repeatedly held that the proper procedure is to remand to the court below for reconsideration under the appropriate constitutional standards, rather than to decide important constitutional issues for the first time without the benefit of a lower court opinion. Thus, where state supreme courts have misread or misinterpreted prior decisions of this Court, this Court has remanded the cases for reconsideration under the correct standard. See, e.g., Moore v. Arizona, 414 U.S. 25, 26 (1973) (remand to

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On the other hand, the obligation of the state or city to pay for the treatment may be different in the pre-conviction period; the presumption that an individual, because he is in custody, is without funds or insurance may have less application to those who have only recently been arrested than to convicted offenders serving prison terms.

Supreme Court of Arizona for reconsideration whether the state court "was in fundamental error in its reading of Barker v. Wingo and in the standard applied in judging petitioner's. . . . claim"). See also Stanton v. Stanton, 429 U.S. 501, 503-504 (1977) (remand where the Utah Supreme Court "misunderst[ood]" initial opinion of the Supreme Court). Similarly, where new claims are framed and argued for the first time in this Court, as is true of the fourteenth amendment claim here, a remand for consideration of these claims by the lower court in the first instance has been ordered. See, e.g., Wood v. Georgia, 450 U.S. 261 (1981) (remand for consideration of potential conflict of interest issue raised by the record in the Supreme

Court); Yoakim v. Miller, 425 U.S. 231, 235-236 (1976) (remand for consideration of issue of potential conflict between federal and state law which emerged and was pressed initially in Supreme Court).

Such a course is particularly appropriate where, as here, the factual record is so opaque and so ambiguous as to render a constitutional decision at this point both abstract and advisory. This Court has consistently insisted that constitutional issues be presented "in clean-cut and concrete form," Rescue Army v. Municipal Court, 331 U.S. 549, 584 (1947), and has refused to adjudicate legal claims where the record does not "adequately flush" the underlying factual issues, Cogwill v.

California, 396 U.S. 371 (1970) (Harlan, J., concurring). See, e.g., Wainwright v. New Orleans, 392 U.S. 598 (1968); Kennedy v. Silas Mason Co., 334 U.S. 249, 257 (1958); Dombrowski v. Eastland, 387 U.S. 82 (1967). See also Minnick v. California Department of Corrections, 452 U.S. 105, 123-127 (1981) (state court decision held not final because of, inter alia, ambiguities in the record); Ellis v. Dixon, 349 U.S. 458, 462, 464 (1955) (Court lacks jurisdiction where record was too "amorphous" for adjudication by either the Supreme Court or the state court).

In this case, neither the two page agreed statement of facts, nor the record as a whole, contains sufficient information to pose concretely, let

alone flush adequately, the question whether due process requires Revere to pay for medical treatment of a suspect in order to ensure that his right to such treatment is secured.* There is no agreement, and no information, as to whether Mr. Kivlin had private or public insurance or resources sufficient to pay for his medical treatment, and whether this would have had any impact on his admission treatment. There is no information on what arrangement, if any, the Revere officers who transported Mr. Kivlin made with the hospital. Nor is there any information on whether the

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*At no time in this litigation has Revere suggested that it was not obligated to secure emergency treatment for Mr. Kivlin. See Brief of Petitioners at 12.

hospital ever attempted to secure compensation -- or could have -- from any source other than the City. There is no information as to the hospital's general practice with respect to indigent or uninsured patients or patients under arrest. There is also no information as to why Mr. Kivlin was brought to this particular hospital, and whether he might have received equivalent treatment at another hospital had Massachusetts General refused to treat him. There is no information as to public hospitals in Revere or Boston, and their availability and practices. In short, the record as it stands now is simply too "vague and empty," Ellis v. Dixon, supra, 394 U.S. at 462, to allow this Court to determine, one way

or the other, whether payment by Revere is necessary to effectuate the right to needed treatment.

Nor does the record support adjudication at this point of the question whether the Constitution might require government to bear the costs of medical treatment made necessary by police use of excessive force in effecting arrest. There is no agreement by the parties, and no finding by the court, as to whether the force in this case was in fact excessive. There is nothing in the record as to whether Mr. Kivlin was armed. There is nothing as to whether police had any reason to believe he was armed. There is nothing as to the procedures in force in Revere or in Massachusetts concerning police use of force,

as to police compliance with these procedures, or as to any pattern of practice of use of force. Here, again, the constitutional issue is a purely abstract one, and there is little reason to expect that a decision by this Court would be more than advisory.

In Kennedy v. Silas Mason Co., 334 U.S. 249 (1948), this Court refused to review the statutory issues relating to overtime compensation under the Fair Labor Standards Act which had been decided by the lower court in granting summary judgment. Instead, the case was remanded for development of a proper factual record. Justice Jackson explained the Court's action:

> We consider it the part of good judicial administration to withhold decision of the ultimate question involved in this case until this or

> another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide.
>
> Without intimating any conclusion on the merits, we vacate the judgments below and remand the case to the District Court for reconsideration and amplification of the record in the light of this opinion and of present contentions. 334 U.S. at 257.

These policies of "good judicial administration" have even greater force where, as here, the ultimate questions are constitutional rather than statutory in nature, and the additional "policy of strict necessity in disposing of

constitutional issues," is thus applicable. Rescue Army v. Municipal Court, 331 U.S. 549, 568 (1947). See Board of Education, Island Trees Union Free School District v. Pico, 102 S.Ct. 2799, 2817 (1982) (White, J., concurring).

In this case, moreover, a remand may well accomplish more than the development of the factual record. It may alter substantially the constitutional questions at issue, or even render resolution of them wholly unnecessary.

Subsequent to the filing of this lawsuit, Massachusetts enacted a new statute requiring all hospitals in the state with a certified emergency unit to provide emergency services to those in need "without discrimination on account of economic status or source of

payment and without delaying treatment for purposes of prior discussion of the source of payment. . . ." Mass. Gen. Laws Ann. c. 111 § 70E (k) (West 1982). The state court held Revere financially liable in this case precisely because it concluded that such liability was required "[t]o ensure Kivlin's right to medical care." (A. 29) This new statute, nowhere mentioned or apparently considered in the proceedings and opinion below, suggests the possibility of a different conclusion.* At the very least,

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*In its brief to this Court, Revere now also argues that municipal liability is unnecessary in view of the obligations imposed on hospitals by the federal Hill-Burton Act, c. 958, § 601 et seq., 60 Stat. 1041 (1946) codified at 42 U.S.C. § 291 (1976), Title XVI of the Public Health Service Act, 42 U.S.C. 3000-3(b)(1)(J) and 42 C.F.R. § 124.603(b)(1). See Brief of Petitioners at 14. The obligation imposed on a hospital by these statutes and regulations turns on the

it is likely to alter the constitutional inquiry, since the hospital can no longer claim that it would not provide treatment without a guaranty of payment; at most, depending upon the interpretation of the state court, the statute may even render the specific constitutional inquiry in this case unnecessary. In this situation, a remand to the state court to consider the effect of the new state statute, prior to any ruling on the constitutional issue, is clearly in order. See Thorpe v. Housing Authority, 386 U.S. 670, 673 (1967) (remand where case would assume a different

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receipt of grant assistance from the federal government. There is, however, nothing in the record before this Court to indicate whether Massachusetts General Hospital has received such assistance and would be obligated to provide the care and treatment which was required by Mr. Kivlin.

posture, and constitutional issue might be avoided, were new HUD directive applied to the petitioner); Bell v. Maryland, 378 U.S. 226 (1964) (remand to state court to consider the effect of a supervening change in state law; constitutional issues not reached); Missouri ex rel. Wabash Railway Company v. Public Service Commission, 273 U.S. 126 (1927) (same).* See also Alma Motor Co. v. Tinker-Detroit Axle Co., 329 U.S. 129 (1946) (duty to decide all statutory issues before reaching constitutional questions); Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101 (1944) (same).

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*The fact that the statute here was passed prior to the decision, rather than after it, does not undermine the argument in favor of a remand. It appears that the statute was not brought to the attention of the state court.

CONCLUSION

For the foregoing reasons, amici respectfully submit that the decision of the Massachusetts Supreme Judicial Court should be vacated, and the case remanded for further proceedings.

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Question Presented.

Does the constitutional obligation of municipalities to provide necessary medical care to one who is in their custody include the obligation to pay for such services?

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Brief of Amici Curiae City of Fitchburg, Town of Millis, Massachusetts City Solicitors and Town Counsel Association in Support of Petitioner.

Interest of the Amici Curiae.

The decision of the Massachusetts Supreme Judicial Court will have significant financial impact upon the various cities and towns in the Commonwealth of Massachusetts during a period of intense fiscal austerity. Accordingly, this brief is co-sponsored by the authorized law officers of the city of Fitchburg and the town of Millis, both political subdivisions of the Commonwealth of Massachusetts, under Supreme Court Rule 36.4, and by the Massachusetts City Solicitors and Town Counsel

Association, an association representing all Massachusetts town counsel and city solicitors.

It is not uncommon for criminal suspects to require medical attention and police officers throughout Massachusetts are required to see to it that proper medical care is provided. Virtually all Massachusetts cities and towns have adopted the following model rules and regulations as promulgated by the Massachusetts Police Chiefs Association through the Massachusetts Police Institute:

> Officer in Charge
>
> B. GENERAL DUTIES AND RESPONSIBILITIES
>
> It is the duty and responsibility of the Officer in Charge to:
>
> 21. Be responsible for the care and handling of prisoners in accordance with departmental policies and procedures and the Massachusetts General Laws. Responsibilities include, but are not limited to, the following guidelines:
>
> b. If the prisoner requires medical attention, summon a physician or, if necessary, have him conveyed to a hospital.

It is to be anticipated that there will now be numerous claims against municipalities for which there are no appropriations and which will cause fiscal and administrative havoc.

Finally, from the point of view of a medium-size or small Massachusetts city or town, the normal scenario for such a claim must inevitably adversely affect the quality and perhaps the availability of medical care to those in Kivlin's position. Perhaps unlike large cities, bills for unappropriated items, such as the $5,360.41 Massachusetts General Hospital bill for

Kivlin, would receive careful public scrutiny by town finance committees, town accountants, and city councils. The police officer who has incurred such an obligation will be called to account and probably second-guessed. Should he or she have used less expensive services, or municipal medical services, or *any* medical services at all? The police officer will have incentive to make medical decisions for which he is unqualified, by shopping for cheaper medical services, or by deciding to use none at all, or else he could be criticized. The realities of small city and town politics and government will give the police officer pause at a time when his only concern should be to obtain the best medical care as soon as possible. Can such a result have been dictated by the Constitution; or, is it not more likely that the various state, federal and local regulations and laws have weighed the policy arguments free from constitutional restraint and have allocated such costs in another manner? Since we believe the latter to be the case, the city of Fitchburg, the town of Millis and the Massachusetts City Solicitors and Town Counsel Association submit this brief in support of the writ of certiorari of the city of Revere.

Argument.

I. The Massachusetts Supreme Judicial Court's Holding That the Eighth Amendment of the United States Constitution Obligates the City of Revere to Pay for Medical Care to Those in the Custody of its Police Department is in Error.

On April 12, 1982, the Massachusetts Supreme Judicial Court held that the Eighth Amendment to the United States Constitution "compels a government agency or division re-

sponsible for supplying those medical needs [to a prisoner under arrest] to pay for them." *Massachusetts General Hospital* v. *Revere*, 385 Mass. 772, 776, 434 N.E.2d 185 (1982). The lower court essentially based its opinion on this Court's holding in the case of *Estelle* v. *Gamble*, 429 U.S. 97 (1976), which was cited to support the proposition that a government's obligation to refrain from deliberate indifference to the serious medical needs of a prisoner is a protection afforded by the Eighth Amendment of the United States Constitution.

In rejecting the city of Revere's argument that *Estelle* v. *Gamble* protects only those prisoners who are being punished by incarceration, the Supreme Judicial Court held that "[i]t is not the fact of incarceration, however, that triggers the protections afforded by the Eighth Amendment. Rather it is the suspect's loss of freedom when he 'cannot by reason of the deprivation of his liberty, care for himself.'" *Massachusetts General Hospital* v. *Revere*, *supra*, at 777, (citation omitted). This holding not only contravenes the rule of *Estelle* v. *Gamble*, but unnecessarily extends it contrary to the spirit and the protections afforded by the Eighth Amendment. This Court and almost all lower courts have repeatedly held that the Eighth Amendment's protections are available only to those who have been convicted of criminal acts.

In *Estelle* v. *Gamble*, prisoner Gamble was injured while performing work on a prison work assignment. A bail of cotton fell on him and he sustained a back injury. This injury necessitated at least 17 trips to the prison infirmary over a three month period. Gamble's civil rights action was prosecuted under § 1983 of Title 42 of the United States Code and his complaint alleged that the petitioners subjected him to cruel and unusual punishment in violation of the Eighth Amendment made applicable to the states by the Fourteenth Amendment. This Court noted that "the primary concern of

the drafters [of the Eighth Amendment of the Constitution] was to proscribe 'torture[s]' and other 'barbar[ous]' methods of punishment." *Estelle* v. *Gamble*, *supra*, at 102 (citation omitted). Although the types of punishment that the amendment proscribed have become more sophisticated, this Court stated that the amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . .," *Jackson* v. *Bishop*, 404 F.2d 571, 579 (8th Cir. 1968) against which we must evaluate penal measures." *Estelle* v. *Gamble*, *supra*, at 102. This Court concluded that the deliberate indifference to serious medical needs of prisoners constitutes "unnecessary and wanton infliction of pain." *Id.* at 104.

That the Eighth Amendment is restricted solely to *criminal punishment* was dealt with squarely by this Court in *Ingraham* v. *Wright*, 430 U.S. 651 (1977). *Ingraham* involved a petition by junior high school students requesting damages, injunctive, and declaratory relief alleging that their rights had been violated by being subjected to disciplinary corporal punishment in violation of the Eighth Amendment. While the evidence tended to show that the paddlings of the petitioners were exceptionally harsh, this Court held that the cruel and unusual punishment clause of the Eighth Amendment did not apply to disciplinary corporal punishment in public schools.

In recounting the history of the Eighth Amendment, this Court said that "in light of this history it is not surprising to find that every decision of this court considering whether a punishment is 'cruel and unusual' within the meaning of the Eighth and Fourteenth Amendments has dealt with a criminal punishment." *Id.* at 666 citing *Estelle* v. *Gamble*, *supra*, *Gregg* v. *Georgia*, 428 U.S. 153 (1976) and *Powell* v. *Texas*, 392 U.S. 514 (1968), *inter alia*. "The primary purpose . . . has always been considered, and properly so, to be directed at the method or kind or punishment imposed for the violation of *criminal statutes*." *Powell* v. *Texas*, *supra*, at 531-532 (emphasis supplied).

Amici submit that that Massachusetts court's reliance on the Eighth Amendment is in error due to the fact that Patrick Kivlin had not been criminally adjudicated. Even assuming *arguendo* that there is Eighth Amendment protection in such situations, there is no basis in fact that would support a conclusion that the city of Revere was "*deliberately* indifferent" to the medical needs of Mr. Kivlin. Quite the contrary findings are apparent from the record. The police officer summoned an ambulance immediately after the shooting and rode in the ambulance with Mr. Kivlin.

Estelle v. *Gamble* and those cases from which this Court drew upon in that decision *all* involve factual situations where clearly there was a showing of deliberate indifference. The case at bar presents no such factual record.

II. There is No Other Constitutional Authority for the Lower Court's Proposition That the Arresting Jurisdiction Pay for Necessary Health Care for Those Within Police Custody.

This Court has ruled on the limits of punishment where there has been no criminal adjudication such as in matters involving pretrial detention. This Court has held that the due process clause of the Fourteenth Amendment establishes the limits on such punishment. See *Bell* v. *Wolfish*, 441 U.S. 520 (1979), where this Court held that the due process clause governs the conditions of confinement for pretrial detainees.

Pretrial detainees are guaranteed needed medical care by the due process clause of the Fourteenth Amendment. Obviously, fundamental fairness and the basic concepts of due process mandate medical care for one who is incarcerated and suffering from serious illness or injury. *Fitzke* v. *Shappell*, 468 F.2d 1072 (6th Cir. 1972).

> An individual incarcerated, whether for a term of life for the commission of some heinous crime, or merely for the night to 'dry out' in the local drunk tank, becomes both vulnerable *and* dependent upon the state to provide certain simple and basic human needs . . . . Denial of necessary medical attention may well result in disabilities beyond that contemplated by the incarceration itself.

Id. at 1076.

The Fourteenth Amendment, therefore, must be read so as to recognize the distinct status of a pretrial detainee, such as the case in bar. Restrictions imposed on detainees are defensable only when they can be justified by the requirements of prison administration or are inherent in the nature of confinement. If the added burdens do not meet the standard, they violate the detainees constitutional right to due process of law. *Norris* v. *Frame*, 585 F.2d 1183 (3d Cir. 1978).

While it is clear that a pretrial detainee such as Patrick Kivlin enjoys such constitutional rights, nowhere in the record is there the slightest intimation that any of those rights were violated. On the contrary, the record reflects that Mr. Kivlin enjoyed immediate and expert medical treatment, the payment for which the lower court has held that city of Revere responsible. Nowhere in the cases cited by this Court or by the Massachusetts court is there the proposition that the duty to provide needed medical care includes the duty to pay for such.

The lower court's holding that the Eighth Amendment mandates that the city of Revere must pay for such medical care is a dangerous step unsupported by constitutional precedent. This Court has *never* indicated that the duty to provide such medical care assumes the duty to pay for same. All the cases cited above deal *solely* with the issue of *when* the duty to provide such care arises and not with the responsibility to pay for same.

It is interesting to note that Massachusetts has legislated a comprehensive statutory scheme which directs hospitals to provide services without regard to economic condition. Mass. Gen. Laws c. 111, § 70(E). This statute together with related welfare and federal legislation (Hill-Burton Act; c. 958, § 601 *et seq.*, 60 Stat. 1041 (1946), codified at 42 U.S.C. § 291 (1976), insures that a prisoner's medical needs will not go unattended. Who pays for this is not a matter of constitutional concern.

For this Court to extend its holding to allocate the responsibility for the *payment* of needed medical services would be an unwarranted intrusion into strictly state matters.

Conclusion.

The judgment of the Massachusetts Supreme Judicial Court, insofar as it reversed the granting of petitioner's motion for summary judgment, should be reversed.

Respectfully submitted,

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No. 82-63.

In the Supreme Court of the United States.

OCTOBER TERM, 1982.

CITY OF REVERE,
PETITIONER,

v.

MASSACHUSETTS GENERAL HOSPITAL,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Brief of Amicus Curiae, the Massachusetts Hospital Association, Inc.

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No. 82-63.

In the Supreme Court of the United States.

OCTOBER TERM, 1982.

CITY OF REVERE,
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MASSACHUSETTS GENERAL HOSPITAL,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Brief of Amicus Curiae, the Massachusetts Hospital Association, Inc.

Interest of the Massachusetts Hospital Association, Inc.

This brief as amicus curiae is submitted on behalf of the Massachusetts Hospital Association, Inc. with the written consent of both parties. Letters consenting to this filing have been filed with the clerk.

The Massachusetts Hospital Association, Inc. (MHA) is a not-for-profit corporation organized and existing under the laws of the Commonwealth of Massachusetts. One-hundred five licensed hospitals, representing 96.4 percent of the acute care beds in this state are members of this Association.

The MHA represents its members in hospital-related issues before the legislative and judicial branches of the Commonwealth, coordinates their activities in many areas, including education and research, and on behalf of its members has certain consulting and negotiating roles recognized by statute.

Because of a long tradition of rate regulation and control by state government affecting the financial viability of hospitals in Massachusetts, MHA frequently serves as a negotiator on behalf of its members with the federal and state governments.

While the issue before the Court in this matter primarily revolves about constitutional rights of a person in the custody of police, the financial fallout of an adverse determination for the hospital will have an impact upon all hospitals that are members of this Association and who must negotiate with the state and its political subdivisions for the care of persons in police custody.

As a result, the MHA has a unique interest in both the constitutional issue to be resolved and the marketplace impact of that determination.

This brief on behalf of the MHA urges acceptance of the principle enunciated in the court below that the City of Revere must be held initially liable to the hospital for the medical services the hospital rendered.

Summary of Argument.

The Eighth Amendment proscription against "cruel and unusual punishment" is triggered by deprivation of liberty

thereby avoiding a false demarcation that would deny its availability until trial and conviction. Alternatively, the proscription is enforced through due process requirements of the Fourteenth Amendment. The obligation to ensure these rights remains with the custodian, which, in the instant case, requires making available appropriate medical care for a wounded prisoner. When that care is made available through private institutions, the concurrent obligation to pay for that care remains with the custodian. (Pp. 16-18.)

Statutory and regulatory mandates that direct the manner in which such care will be made available by private institutions cannot be enlisted to shift the obligation to pay for that care from a public to a private entity. (Pp. 7-16.)

Argument.

I. Introduction.

The Supreme Judicial Court of Massachusetts held that Kivlin was a prisoner in the custody of the Revere Police Department during the period of his hospitalization immediately following his arrest, and that City of Revere was therefore liable for the expenses of that confinement.[1] The court reasoned that the deprivation of liberty associated with Kivlin's detention triggered the requirement for the government to provide medical care.

Relying on *Estelle* v. *Gamble*,[2] the court below concluded that the Eighth Amendment's prohibition of indifference to

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[1] *Massachusetts General Hospital* v. *Revere*, 385 Mass. 772, 776-777 (1982).

[2] 429 U.S. 97 (1976).

the medical needs of prisoners compelled a governmental agency or subdivision responsible for supplying those needs to pay for them. Petitioner, also relying on *Estelle*,[3] *supra*, has argued that the Eighth Amendment's prohibition applied only to incarcerated prisoners. In the petition for certiorari to this Court, petitioner now supports this argument by reference to *Ingraham* v. *Wright*[4] and *Bell* v. *Wolfish*,[5] wherein the court stated that the Eighth Amendment protections apply to cruel and unusual punishment inflicted following trial and conviction.

In addition, petitioner raises a question as to whether a private hospital is obligated to furnish medical care to prisoners in police custody without compensation.

Amicus intends to support the determination by the court below that the prisoner's right to medical care is triggered by the Eighth Amendment prohibitions against cruel and unusual punishment or alternatively, by the due process requirements based on the Fifth and Fourteenth Amendments.

Further, amicus supports the respondent's contention that the obligation to pay for the prisoner's care is one that rests initially with the City of Revere.

II. The Protections Afforded under the Eighth Amendment and the Fourteenth Amendment are Triggered by an Individual's Loss of Freedom when He Cannot, by Reason of the Deprivation of this Liberty, Care for Himself.

The scope of protection available under the Eighth Amendment is broad. As this Court has noted, the Eighth Amend-

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[3] 429 U.S. at 103.

[4] 430 U.S. 651 (1977).

[5] 441 U.S. 520 (1979).

ment prohibits punishment of an individual on the basis of status alone in the absence of some act.[6] Recent cases have dealt with the kinds of punishment which are acceptable following an adjudication of guilt, as in *Gregg* v. *Georgia*.[7] By contrast, from Robinson we may deduce the principle that punishment itself is unjustifiable in the pre-conviction stage, when the suspect's status is merely that of a detainee. Since deprivation of needed medical care constitutes punishment, such conduct is prohibited under the Eighth Amendment.[8] In the instant case Kivlin's detainee status attached at the moment that he was deprived of his liberty.[9] This deprivation of his liberty triggers his right to necessary emergency medical care and obligates the City of Revere to present the prisoner for care, and having done so, to obligate itself to respondent for the cost of that care.[10] Alternatively, this same conclusion could be reached by due process analysis grounded in the Fifth and Fourteenth Amendments.

Due process requires that there be no punishment in the absence of an adjudication of guilt. This Court has so found specifically for pretrial detainees.[11] The status of detainee im-

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[6] See *Robinson* v. *California*, 370 U.S. 660 (1962); *Powell* v. *Texas*, 392 U.S. 514 (1968).

[7] 428 U.S. 153 (1976).

[8] See e.g., *Fielder* v. *Bosshard*, 590 F.2d 105, 107 (5th Cir. 1979); *Bowring* v. *Godwin*, 551 F.2d 44, 46 (4th Cir. 1977).

[9] 385 Mass. at 778 where the court below succinctly stated the facts and determination of custody. "[A]t the time the police bullet entered his body he was under arrest. He was intentionally seized by the police at that moment and a reasonable person could only believe that he was then under arrest."

[10] Amicus offers no support to broaden the city's obligation beyond the specifics of a prisoner under arrest and injured either by direct police action or in attempting to avoid arrest.

[11] *Bell* v. *Wolfish*, 441 U.S. at 535 n.16; *Ingraham* v. *Wright*, 430 U.S. at 671-672 n.40; See also *Youngberg* v. *Romeo*, 102 S. Ct. 2452 (1982).

mediately imposes an obligation on government vis-à-vis the detainee. If he has already been convicted then this obligation may be coupled with punishment, provided this is neither cruel nor unusual. If not yet convicted, the obligation is coupled with a requirement that he not be punished. In either case, the government's obligation is triggered by the fact of detention, which operates to deprive the individual of a protected liberty interest. The essential factor is that of detainee status.

The suspect may be restricted in or deprived of his freedom prior to an adjudication of guilt, but if this is accompanied by conduct amounting to punishment, the due process standard will be violated. Pretrial detainees retain at least those unconstitutional rights that are enjoyed by convicted prisoners. Thus, "conditions found to constitute cruel and unusual punishment when imposed on convicted inmates would surely be viewed as unconstitutional punishment when imposed on similarly situated unconvicted detainees."[12]

In the instant case the facts overwhelmingly support the determination that Kivlin's status at the time of the emergency medical care was that of a detainee. The court below finds that an arrest has occurred when there has been an intentional and an actual or constructive seizure or detention of the person, and this is so understood by the person detained.[13] By this standard Kivlin was a detainee at the time he was taken to the hospital.

Due process also requires that a pretrial detainee not be punished. The constitutional issue rests on a determination of

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[12] *Campbell* v. *Cauthron*, 623 F.2d 503, 505 (8th Cir. 1980).

[13] 385 Mass. at 778, see n.9, *supra*. See also *Ramsey* v. *Ciccone*, 310 F. Supp. 600 (W.D. Mo. 1970); *Dodge City Med. Center* v. *Bd. of Cty. Com'rs*, 6 Kan. App.2d 731, 634 P.2d 163 (1981); *Lutheran Medical Center* v. *City of Omaha*, 204 Neb. 292, 281 N.W.2d 786 (1979).

whether or not the circumstances are punitive in nature.[14] Failure to provide reasonable medical services, the lack of which could result in deprivation of life, would constitute a due process violation. Similarly, "failure to provide a pretrial detainee with an environment that does not impair his mental and emotional health is punishment and violative of his Fourteenth Amendment rights."[15] Due process violation is clearly not limited to behavior which would constitute cruel and unusual punishment. But that conduct which would violate the Eighth Amendment for convicted inmates would certainly constitute a due proces violation for detainees. This is a clear and necessary result of the teaching of *Bell, supra.*

III. A State or Federal Statute Requiring Hospitals to Make Certain Services Available does Not Create an Independent Obligation on the Part of a Private Hospital to Render Services Without Compensation to the Hospital.

Petitioner raises the issue whether a private hospital has an obligation to provide emergency medical services to persons in the custody of police *without compensation*. Petitioner appears to argue that certain legislation requiring hospitals to provide emergency services operates to assure the universal availability of free emergency care in Massachusetts, thereby shifting the financial burden of caring for prisoners from the responsible governmental entity to private hospitals.[16] This

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[14] See *Putnam* v. *Gerloff*, 639 F.2d 415, 419 (8th Cir. 1981); *Campbell* v. *Cauthron*, 623 F.2d at 505; *Bowring* v. *Godwin*, 551 F.2d at 47.

[15] *McMurry* v. *Phelps*, 533 F. Supp. 742, 762 (W.D. La. 1982). See also *Wright* v. *City of Reno*, 533 F. Supp. 58, 65-66 (D. Nev. 1981).

[16] Brief of Petitioner, p. 13.

case, however, does *not* involve any issue of a private hospital's obligations to provide services free of charge. Moreover, legislation requiring hospitals to make certain services available does not create any independent obligation on the part of a private hospital to render services without compensation. Reliance upon hospitals to treat prisoners in accordance with such a hypothetical duty is wholly unwarranted.

It is obvious that ordinary statutory requirements for the type and quality of hospital services, facilities, and staff in no way purport to require a private hospital to offer such services without compensation. On the contrary, it is clearly understood that the hospital provides such services in return for appropriate compensation.

The Massachusetts Patients Bill of Rights requires hospitals to render prompt life saving treatment to persons who are not yet admitted as patients if the hospital has a certified emergency care unit.[17] The statute does not require a private hospital to render emergency services gratuitously.[18] The statute is

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[17] Mass. Gen. Laws Ann. c. 111, § 70E(k). The Patients Bill of Rights was enacted on May 23, 1979, more than 8 months after Kivlin was brought to the hospital, and does not apply in this case.

The statute grants to hospital patients, *inter alia*, the right: "(k) to prompt life saving treatment in an emergency without discrimination on account of economic status or source of payment and without delaying treatment for purposes of prior discussion of the source of payment unless such delay can be imposed without material risk to his health, and this right shall also extend to those persons not already patients or residents of a facility if said facility has a certified emergency care unit;"

[18] Traditionally, the common law in most states held that a private hospital had no duty to accept any patient. *Guerrero* v. *Copper Queen Hospital*, 112 Ariz. 104, 537 P.2d 1329 (1975). A minority rule developed following *Wilmington General Hospital* v. *Manlove*, 54 Del. 15, 174 A.2d 135 (1961), holding that, while a private hospital is under no duty to maintain an emergency ward, if the hospital does maintain such a ward and holds it open to the public, it must provide emergency services to anyone who could reasonably be considered to require emergency care. Both the majori-

designed to ensure that hospitals act to provide life-saving care first, and determine how they will receive payment for care later. It focuses upon the prompt delivery of care in emergency situations, in contrast to non-emergency hospital admissions, where a hospital may determine a prospective patient's source of payment for services, before the services are rendered.

The text of the statute clearly contemplates that the hospital will receive payment and even permits delaying treatment to discuss the source of payment where "such delay can be imposed without material risk to [the patient's] health."[19] The hospital's statutory duty is to render emergency care in a nondiscriminatory manner *before* determining the source of payment. It cannot be interpreted as a duty to render gratuitous care without distorting both the language and the purpose of the statute. The City of Boston, in its brief as *amicus curiae*, suggests that a statutory duty to provide emergency care to all those who require it is tantamount to requiring free emergency

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ty and minority rules, however, only addressed the rendering of services in response to complaints that services had not, in fact, been rendered. Neither suggested that such services be provided without compensation.

[19] Mass. Gen. Laws Ann. c. 111, § 70E(k). Other provisions in the Patients Bill of Rights also contemplate that the hospital will receive payment from some source. The fourth (unnumbered) paragraph of the statute provides: "Every such patient or resident of said facility in which billing for service is applicable to such patient or resident, upon reasonable request, shall receive from a person designated by the facility an itemized bill reflecting laboratory charges, pharmaceutical charges, and third party credits and shall be allowed to examine an explanation of said bill regardless of the source of payment. . . ." Mass. Gen. Laws Ann. c. 111, § 70E.

Similarly, a separate provision grants patients the right "upon request to receive a copy of the bill or other statement of charges submitted to any third party by the facility for the care of the patient or resident." Mass. Gen. Laws Ann. c. 111, § 70E(m).

care to all who require it.[20] But the statute is not restricted to indigent persons; it grants the right to prompt treatment to all patients in an emergency. If the statute were construed to require such care to be rendered free of charge, it would have to be given free to all patients, regardless of health insurance coverage or ability to pay. Plainly, the statute does no such thing. It simply ensures that hospitals will do as respondent did in this case: help first, and ask questions later.

Certain hospitals that received construction assistance grants under the Hill-Burton Act gave assurances to the federal government that they would provide a reasonable volume of uncompensated services to needy persons over a period of twenty years.[21] The Department of Health, Education and Welfare interpreted the concept underlying such assurances to be that facilities undertook to provide a fixed amount of uncompensated services, not an open-ended charitable obliga-

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[20] Brief of Amicus Curiae City of Boston, p. 10, n.12. While a hospital that refused to provide emergency care would be subject to liability for malpractice, liability is clearly grounded in the *failure to treat*. Mass. Gen. Laws Ann. c. 111, § 70E and c. 231, §§ 60-B-E. None of the statutory provisions cited imposed liability for failure to provide *gratuitous* care. If care is in fact (properly) rendered, no malpractice liability attaches, and the hospital is certainly entitled to payment for such care. (An exception to the hospital's entitlement to payment for care could arise independently if the hospital had received Hill-Burton funds and elected to provide uncompensated services to the patient in question.) (See n.21 below and accompanying text.) Similarly, standards published by the Joint Commission on Accreditation of Hospitals in its Accreditation Manual for Hospitals address the quality of emergency service rendered, without any suggestion that such services be provided gratuitously.

[21] Hospital Survey and Construction Act, 60 Stat. 1041 (1946), Public Health Service Act, Title VI, § 603(e), codified at 42 U.S.C. § 291c(e) (1982). It cannot be assumed that respondent is among those hospitals subject to Hill-Burton since the record is silent on the question.

tion.[22] Moreover, the Act excuses a hospital from its assurance to the extent that compliance is not financially feasible.[23]

The obligations of hospitals under the Hill-Burton Act do not serve to make universal free care available.[24] The class of patients intended to receive the benefit of expanded hospital facilities free of charge are persons whose income and assets are insufficient to pay for hospital services.[25] Eligibility is firmly grounded in a patient's inability to pay; if some third party, such as a government agency or an insurer, is legally responsible to pay for a patient's care, that patient would not

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[22] Summary of Public Comments and Department's Actions on the Uncompensated Services and Community Service Regulations, 44 F.R. 29382 (May 18, 1979). Under present regulations, the reasonable volume of services is limited to an aggregate dollar amount. 42 C.F.R. §§ 124.501, 124.503(a) (1981).

[23] 42 U.S.C. § 291c(e)(3). Regulations in effect at the time Kivlin was treated at MGH did not require any hospital covered by Title VI to make up any "deficit" in its volume of free care. 42 C.F.R. 53.111(e)(2)(iii) (1976). Current regulations require a deficit caused by financial hardship to be made up in the future, but leave the decision as to when to provide such free care solely to the discretion of the hospital, thus permitting a hospital to offer free care as and when its financial condition permits. See 42 C.F.R. § 124.503(b)(1) (1981).

[24] *Newsom* v. *Vanderbilt University*, 653 F.2d 1100, 1117 (6th Cir. 1981) (Hill-Burton not intended to provide needed services for all who could not pay).

[25] Under regulations in effect in 1978, the state agency sets criteria for eligibility. 42 C.F.R. § 53.111(g) (1976). Present regulations provide for federal establishment of eligibility criteria according to the Community Services Administration Poverty Income Guideline. 42 C.F.R. § 124.506 (1981). Persons with incomes at or below the poverty level are eligible for free care; but hospitals may, if they choose, charge persons with incomes above the poverty level for all or part of the services rendered. 42 C.F.R. § 124.506(a)(2) (1981).

The regulations make clear that hospitals may tailor their plans for compliance according to their own best judgments, and may decide when and what kind of services are made available free of charge. 42 C.F.R. § 124.507 (1981); 44 F.R. 29373 (May 18, 1979).

be eligible for uncompensated services under Hill-Burton.[26] The entire structure of the Act and regulations clearly further a goal of aiding the needy, those persons who, in days gone by, would have been considered "charity cases." If the Act were construed to require hospitals to provide free care to felons, misdemeanants, and suspects in custody, the sole beneficiaries would be the state and local treasuries. The real burden would fall on needy civilian patients, for hospitals would have fewer uncompensated services to offer the poor.[27]

The only instance in which a hospital is obliged to provide free care, regardless of eligibility for uncompensated services, is contained in the regulations which prohibit a hospital having an emergency unit from denying emergency services to a community resident even if that person is unable to pay for such services.[28] If that person is in fact eligible for uncompensated services, however, the services may be counted to fulfill the hospital's quota of free care. A hospital is not obligated to offer non-emergency services to persons unable to pay therefor, unless those persons are eligible for the uncompensated service provided by the hospital.[29]

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[26] Services are not counted as uncompensated if the hospital is entitled to payment from a governmental program or third party insurer. 42 C.F.R. § 53.111(f)(2) (1976); 42 C.F.R. § 124.509 (1981).

[27] Regulations requiring notice of the availability of free services to be published in local newspapers and posted in the hospital are additional evidence that the obligation extends to civilian community residents, not state or local prisoners. 42 C.F.R. § 53.111(h)(4), (i) (1976); 42 C.F.R. § 124.505(a), (b) (1981).

[28] 42 C.F.R. § 124.603(b)(1) (1981). The emergency services required to be offered are only those necessary to treat the emergency; that is, to stabilize the patient, who may be transferred to another hospital willing and able to admit an indigent patient, if his medical condition permits. 42 C.F.R. § 124.603(b)(2) (1981).

[29] 42 C.F.R. § 53.111(d) (1976); 42 C.F.R. § 124.603(a) (1981). Such services are, of course, to be offered to all persons living in the service area without discrimination on the basis of race, color, national origin, creed, or

The general thrust of the Hill-Burton legislation is to cause those hospitals that have received federal assistance to repay the federal government by providing services to their communities. The assurances of free care are clearly intended as last resort for the poor in the community.[30] There is no indication that they were meant to shield the state or its cities and towns from paying for the care of prisoners. Indeed, Hill-Burton would be an ineffective mechanism to ensure care for prisoners, since a government's obligation to provide medical care to its prisoners is continuous and non-delegable, while not all hospitals have received Hill-Burton assistance, and those that have may have already satisfied their obligations to provide free care, or may do so in the foreseeable future. Accordingly, not all hospitals to which wounded suspects or prisoners might have to be sent in an emergency have or will have any obligation to provide any free care. In any event, not all prisoners are eligible for free services even if they were to reach a hospital that is subject to Hill-Burton obligations. Thus, Hill-Burton is not a rationale for assuming that hospitals can or must provide services to prisoners free of charge.

The Massachusetts Medicaid Act[31] was established in conformity with Title XIX of the Social Security Act[32] to provide assistance to certain residents of the commonwealth. Pursuant to the act, Massachusetts voluntarily participates in a

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any other ground unrelated to medical need or the availability of the service within the hospital. Grounds for denial of non-emergency services include inability to pay. The "community service obligation" of a hospital receiving Hill-Burton funds merely requires opening newly constructed facilities to persons in the community service area. Public Health Service Act, Title XVI § 1602(6) 58 Stat. 690, codified at 42 U.S.C. 300o-1(6) (1976). A hospital is entitled to charge persons able to pay for such services.

[30] See 44 F.R. 29394 (May 18, 1979).

[31] Mass. Gen. Laws Ann. c. 118E.

[32] 79 Stat. 343 (1965), codified at 42 U.S.C. § 1396 *et seq.* (1974).

federally approved Medicaid plan and receives federal reimbursement for a percentage of the costs of medical care provided to eligible patients which the state incurs.[33] The federal-state joint venture is clearly designed to enable certain needy persons to obtain necessary medical care by making state and federal governments responsible for payment for such care.[34]

Coverage under Medicaid means simply that such care will be paid for by the government under the Medicaid regulations.[35] Both the federal and state acts and regulations provide extensive rules for determining when and how services will be paid for. Neither purports to prescribe the kinds of services that must be provided by hospitals in the abstract, nor what kinds of services must be provided to persons who are not Medicaid beneficiaries. To the extent that Medicaid furthers a social policy favoring care for the indigent, it does so explicitly by paying for such care. It does not create any new social policy that care should be rendered gratuitously.

In keeping with the general purpose of the Medicaid program to use state and federal monies to pay for the care of the medically needy indigent, eligibility for services as a Medicaid beneficiary are strictly defined in terms of financial condition or disability. It is clear that prisoners are not among the intended beneficiaries of Medicaid programs. Both the Federal

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[33] State participation in the Medicaid program is entirely voluntary. Moreover, hospital participation in the Massachusetts Medicaid program is also voluntary. Mass. Gen. Laws Ann. c. 118E, § 18.

[34] *Harris* v. *McRae*, 448 U.S. 297 (1980).

[35] The Massachusetts act provides medical assistance for the types of care specified in Title XIX and regulations adopted thereunder. Mass. Gen. Laws Ann. c. 118E, § 6. In Massachusetts, the Department of Public Welfare is charged with furnishing medical assistance to eligible persons. The statute also requires that "[p]ayment shall be made to the person or institution supplying medical services." Mass. Gen. Laws Ann. c. 118E, § 5.

Act and regulations exclude from coverage services to inmates of penal institutions.[36] The existence of the Medicaid or any other public welfare program cannot serve to absolve penal authorities of their financial responsibility for the care of prisoners.

No court, to the knowledge of *amicus*, has found a private hospital obliged to provide free care to a person in police custody on the basis of statutes merely prescribing that certain services be made available by the hospital.[37] Indeed the cases known to *amicus* in which a private hospital was found not to be entitled to collect payment from the arresting jurisdiction did not address or even mention any obligation on the part of the hospital to provide free care.[38] Rather, such cases were

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[36] 42 U.S.C. § 1396(d), 42 C.F.R. §§ 435.1008, 435.1009 (1978).

[37] *Dodge City Med. Center* v. *Bd. of Cty. Com'rs*, 6 Kan. App.2d 731, 634 P.2d 163 (1981) (sheriff has duty to furnish medical attention to suspect shot by police in pursuit, at the county's expense if the suspect is indigent and no other source of funds is available); *Lutheran Medical Center* v. *City of Omaha*, 204 Neb. 292, 281 N.W.2d 786 (1979) (county obligated to provide and pay for necessary emergency medical services rendered by hospital to suspect wounded by police and jailed prisoner with sudden agina, under *Estelle* v. *Gamble*, 429 U.S. 97 (1976); *City of Tulsa* v. *Hillcrest Medical Center*, 292 P.2d 430 (Okla. 1956). (City had duty to pay for emergency hospital care of prisoners and suspects, even in absence of statute requiring city to provide medical services to prisoners, since statutes requiring jail maintenance imply city's authority to appropriate funds for medical care); *City of Tulsa* v. *Sisler*, 285 P.2d 422 (Okla. 1955) (same); *Lamar* v. *Board of Com'rs*, 4 Ind. App. 191, 30 N.E. 912 (1892) (same, applicable to county); *Sisters of Charity of Providence* v. *Washington Co.*, 244 Ore. 499, 419 P.2d 36 (1966) (county had obligation to pay for hospital care of suspect derived from jailkeeper's statutory duty to provide medical aid to prisoners in jail and statutory provision for expenses of prison maintenance to be paid out of county treasury); *Spicer* v. *Williamson*, 191 N.C. 487, 132 S.E. 291 (1926) (county's statutory duty to care for prisoners includes duty to pay for necessary care of wounded suspect provided outside jail in emergency circumstances); *Miller* v. *County of Dickinson*, 68 Iowa 102, 26 N.W. 31 (1885) (same).

[38] *Dade Cty.* v. *Hospital Affiliates Intern.*, 378 So.2d 43, 44 (Fla. App. 1979) (county not required to pay for care of men stabbed in domestic alter-

decided solely upon the absence of city or county statutory authority to contract for payment for *ad hoc* services outside a jail. There was no suggestion that a private hospital had any independent duty to provide free care.[39]

There is no question in this case that state and local governments have an affirmative duty to provide medical care for persons in their custody. The contention that cities ought not be troubled to pay for such care because hospitals must provide it anyway is both incorrect and improper. It would convert a public duty into a private burden.

IV. The Obligation of a Governmental Subdivision to Preserve the Constitutional Rights of a Detainee by Making Medical Care Available Compels that Agency to Pay for Such Care.

An individual is entitled to the protection and preservation of his constitutional rights which attach at the moment when

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cation because they were neither in police custody nor under arrest; the court in dictum noted that "we may assume that a county or other governmental entity would be liable to a . . . hospital which renders medical services to its prisoners"); *Windham Commun. Mem. Hosp.* v. *City of Willimantic*, 166 Conn. 113, 348 A.2d 651 (1974) (city had no obligation to pay for care of suspect wounded in arrest, because statutes requiring maintenance of prisoners did not cover medical care and applied only to towns, not cities); *Trinity Hospital Association* v. *City of Minot*, 76 N.W.2d 916 (N.D. 1956) (in absence of express statutory authority, city not obligated to pay hospital for care of prisoner).

[39] In contrast, a public hospital might be required to provide free care to certain needy community residents if the statute creating such public hospitals expressly obligates them to offer free care. *King County* v. *City of Seattle*, 70 Wash. 2d 988, 425 P.2d 887 (1967) (en banc) (city not obligated to pay for care of indigent city prisoners, because no statute required city to pay for such care, but statute establishing county hospitals explicitly required hospitals operated by counties to admit free of charge persons unable to pay).

his liberty right is restricted by the State. The essential factor is his status as detainee. The distinction between the pre and post-conviction detainee inheres to the question of punishment. Adjudication of guilt warrants punishment, but under the Eighth Amendment it must not be either cruel or unusual. For the pre-trial detainee, however, due process prohibits punishment. In either case once detainee status attaches a governmental obligation of care follows. Thus, the government is obligated to provide necessary medical care for those whom it is punishing by incarceration.[40] In considering questions of govermental obligation with respect to constitutional rights, it is amicus' view that it is immaterial whether these arise in the pre or post-conviction stage of the criminal process, since it is only the fact of the individual's status as detainee which is relevant. Thus, both Eighth and Fourteenth Amendment definitions of punishment and limitations on conditions of confinement are relevant to the analysis of necessary medical treatment of any pretrial detainee.

Lower courts have agreed that the government is responsible for protection and preservation of the constitutional rights of detainees. When a state legitimately acts to deprive a person of his liberty, it is obligated to assume the economic burden necessary to preserve the constitutional rights of the person jailed or imprisoned.[41] Moreover, inadequate funding may not be used to justify the perpetuation of unconstitutional conditions of confinement.[42] Similarly, economic justifications alone cannot support the deprivation of constitutional rights.[43]

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[40] *Estelle* v. *Gamble*, 429 U.S. at 103.

[41] *Dawson* v. *Kendrick*, 527 F. Supp. 1252, 1283 (S.D. W.V. 1981).

[42] *Smith* v. *Sullivan*, 611 F.2d 1039, 1043-1044 (5th Cir. 1980).

[43] *Inmates of Suffolk County Jail* v. *Eisenstadt*, 360 F. Supp. 676, 688 (D. Mass. 1973) *aff'd.* 494 F.2d 1196 (1st Cir.), *cert. denied sub nom.*; *Hall* v. *Inmates of Suffolk County Jail*, 419 U.S. 977 (1974).

Amicus advises the court that many hospitals in the Commonwealth do not bill for services rendered to this class of patient based on years of frustrated effort to recover payment from governmental subdivisions. However, this lack of payment now becomes even more damaging with the implementation of a major statutory change regulating reimbursement to hospitals in Massachusetts.[44] Hospital budgets are so impacted by this Act that some are reducing services and furloughing employees.

While denial of payment for these services may benefit the city treasury, it places a discriminatory burden on the small class of sick patients who utilize that hospital since the cost must be recovered from some source. It is also the practice in most hospitals to first seek recovery of these costs from insurance coverage held by the prisoner. The likelihood of a prisoner wounded by police during apprehension as a suspect in a crime having health insurance coverage would defy calculation.

Thus, in most instances, the hospital, and so its patients, are left to bear a burden that should be more appropriately shared by the general population.

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[44] Mass. Gen. Laws Ann. c. 6A, § 31 *et seq.*, as amended by c. 372, Acts of 1982. Its avowed purpose is to restrain the rate of growth of hospital costs in Massachusetts and equalize payment to hospitals by third party payors. It is estimated that the institutions will face a loss against expected net revenue in the fiscal years 1983 through 1985 of $283,000,000 from only one factor in the act. Mass. Health Care Coalition overview and impact report, August, 1982.

Conclusion.

The judgment of the Supreme Judicial Court of Massachusetts that the petitioner, responsible for the prisoner's deprivation of liberty, should bear the financial burden required to protect the prisoner's constitutional rights, should be affirmed.

Respectfully submitted,

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No. 82-63

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CITY OF REVERE,

Petitioner,

v.

MASSACHUSETTS GENERAL HOSPITAL,

Respondent.

On Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts

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BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION

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QUESTION PRESENTED

Was Patrick M. Kivlin "inflicted" with "cruel and unusual punishment" under the Eighth Amendment by the mere refusal of the City of Revere to pay Massachusetts General Hospital for medical services it rendered to Kivlin for injuries he sustained while being apprehended by the police?

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BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION

INTERESTS OF *AMICUS CURIAE* WASHINGTON LEGAL FOUNDATION

The Washington Legal Foundation (WLF or Foundation) is a national non-profit public interest law center organized under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 85,000 members throughout the United States, including Massachusetts, whose interests the Foundation represents.

More specifically, WLF participates in and devotes a substantial portion of its resources to matters raising criminal justice and related constitutional issues. WLF's concern for the physical, psychological and financial impact crime has on its victims, their families, and society has led to the Foundation's establishment of a Crime Vic-

tims Program. This program is designed to advance the rights of crime victims and to help reduce the alarming crime rate in America. Among other activities, WLF provides legal guidance and assistance to the victims of violent crime, encourages victims to file civil suits for damages against their attackers,[1] participates in rule-making proceedings before the U.S. Parole Commission, and monitors those criminal cases in which the courts have been too lenient in sentencing violent criminals and otherwise have exhibited an insensitivity to the rights of victims and the law-abiding public.

In the instant case, WLF seeks to advance the interests of its members, the citizens of Massachusetts, and the public at large by urging this Court to reverse the court below. The Supreme Judicial Court for the Commonwealth of Massachusetts presently holds that municipalities have a constitutional duty arising under the Eighth Amendment to pay the medical expenses of felony suspects injured while being apprehended by the police. This novel decision ignores Eighth Amendment jurisprudential principles as enunciated by this Court and stands as an unwarranted judicial interference in an area best handled by elected states legislatures.

The Foundation has appeared before this Court as *amicus curiae* on numerous occasions. *See, e.g., Williams v. Zbaraz*, 448 U.S. 358 (1980); *Enmund v. Florida*, —— U.S. ——, 102 St.Ct. 3368 (1982); *Zant v. Stephens*, —— U.S. ——, 102 S.Ct. 1856 (1982); *Edwards v. United States*, 430 A.2d 1321 (D.C. Ct. App.), *cert. denied*, —— U.S. ——, 102 S.Ct. 1721 (1982); *Murphy v. Hunt*, —— U.S. ——, 102 S.Ct. 1181 (1982).

WLF can bring to this case a perspective not presently represented which may assist this Court in arriving at a

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[1] For example, WLF is representing the Secret Service agent shot by John W. Hinckley, Jr. in a civil suit for compensatory and punitive damages. *McCarthy v. Hinckley*, No. 82-0866 (D.D.C. filed March 29, 1982).

full consideration of all the public interest issues. The present parties to this controversy are primarily concerned with the end results of this lawsuit, *i.e.*, who is responsible for paying the costs of the medical treatment incurred by the felony suspect who was wounded by Revere police officers. WLF's concern, however, is with the broader public interest issues arising out of these particular facts. The Foundation submits that the Supreme Judicial Court's decision should be overturned in the interests of clarifying Eighth Amendment principles, and to limit judicial law-making.

STATEMENT OF THE CASE

In the interests of judicial economy, *amicus* adopts the recitation of facts as presented by the Supreme Judicial Court of Massachusetts in *Massachusetts General Hospital v. City of Revere*, 434 N.E.2d 185, 185-86 (1982). However, in order for the constitutional issues presented by this case to be viewed in their proper context, *amicus* wishes to stress the following.

The felony suspect in question, Patrick M. Kivlin (Kivlin), was wounded by a Revere police officer as he attempted to flee from the scene of an attempted house break-in. The police thereafter summoned an ambulance and Kivlin was taken to the emergency room at Massachusetts General Hospital (MGH). There, Kivlin received immediate and proper medical treatment for his gunshot wound and was released. Whatever right he had to receive medical care was thus effectively preserved at this point.

There is no indication in the record that Kivlin was indigent or unable to pay for the costs MGH incurred in treating his wound. Nevertheless, MGH chose not to sue Kivlin in a civil action to recover its medical fees. Indeed, MGH did not even take the time to send Kivlin a bill for its services. MGH's reaction was to send the bill directly to the City of Revere (via its Police Department) and, later, to sue the City when it refused to pay.

Nothing also is known about how Kivlin views the present suit. Certainly, there is no indication in the record to suggest that he even remotely believes that his Eighth Amendment rights were violated by the City. MGH's suit was apparently instituted without his consent and, quite possibly, without his knowledge. In this regard, respondent's own characterization of its suit as a "collection case" (Respondent's Brief in Opposition to Petition at 2), rather than a constitutional one is revealing.

SUMMARY OF ARGUMENT

The Supreme Judicial Court of Massachusetts clearly erred by holding that a municipality has a constitutional duty, arising under the Eighth Amendment, to pay for medical services rendered to a felony suspect injured while being apprehended by the police. The court thus erroneously ruled that a person has been unconstitutionally inflicted with cruel and unusual punishment by the mere refusal of the city to pay for such medical services rendered, apparently regardless of (1) the cost of such services, (2) whether the person could pay for the services he received, and (3) whether the person even knew, let alone cared, that he was being so inflicted with this allegedly cruel and unusual punishment.

MGH argues that Kivlin's right to medical care would be jeopardized if Revere did not pay for his hospital bills. The fact remains, however, that Kivlin *did* receive proper medical care and there is no suggestion that such care will not be forthcoming in the future for other persons in need who are arrested by the police.

This novel and, frankly, absurd decision, totally misinterprets basic Eighth Amendment jurisprudence, ignores the law of standing, and intrudes into an area best left to the legislative branches of government. For these reasons, *amicus* submits that the decision is contrary to the public interest and should be summarily reversed.

ARGUMENT

I. THE EIGHTH AMENDMENT'S PROHIBITION AGAINST "CRUEL AND UNUSUAL PUNISHMENTS" DOES NOT GOVERN TREATMENT OF CRIMINAL SUSPECTS PRIOR TO CONVICTION.

The Eighth Amendment to the Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The constitutional history of the "cruel and unusual punishment" clause is well known to this Court. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 169-73 (1976). Rather than give a lengthy account of that history here, it suffices to note that the primary concern of the drafters was to proscribe torture and other methods of punishment then deemed to be barbarous. *See* Granucci, *Nor Cruel and Unusual Punishment Inflicted: The Original Meaning*, 57 Calif. L. Rev. 839, 842 (1969). Over the years, this Court has gradually broadened the protections afforded under the "cruel and unusual punishments" prohibition in accordance with "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). In every case in which this Court has had occasion to interpret the meaning of the Amendment's prohibition, however, it has done so by beginning with the elementary principle that the Amendment proscribes physically unnecessary or barbarous punishments, and that punishment can be imposed only after a criminal conviction has been secured. As this Court noted in *Ingraham v. Wright*, 430 U.S. 651, 664 (1977):

> The Eighth Amendment provides: 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Bails, fines, and punishment traditionally have been associated with the criminal process, and by subjecting the three to parallel limitations the text of the Amendment suggests an intention to *limit the power* of those entrusted with the criminal-law function of govern-

> ment. *An examination of the history of the Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes.* We adhere to this longstanding limitation . . . . (emphasis added).

In *Estelle v. Gamble*, 429 U.S. 97 (1976), this Court broadened the scope of the Eighth Amendment's prohibition against cruel and unusual punishment to include a prohibition against the deliberate indifference by prison personnel to a prisoner's serious illness or injury. However, this Court made it clear that the right to such medical care applies only to those individuals who are being punished by incarceration and are therefore presumably unable to obtain care for themselves:

> [T]he government's obligation [under the Eighth Amendment is] to provide medical care for those whom it is *punishing* by incarceration. *An inmate* must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical "torture or a lingering death". . . . In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose.

Id. at 103 (citations omitted) (emphasis added).

The "longstanding limitation" on the application of the Eighth Amendment is clear. The Eighth Amendment applies only *after* the government has secured a criminal conviction. At that point the government is limited as to the types of punishment it may constitutionally inflict.

Where, as in the present case, there had been no formal adjudication of guilt, the state is without the power to punish. Consequently, the Eighth Amendment's prohibition against "cruel and unusual punishments" is inapplicable to persons such as Kivlin. Rather, it is the Due Process Clause of the Fourteenth Amendment that gov-

erns the rights of persons in official custody prior to criminal conviction, or in a noncriminal context. *Ingraham v. Wright*, 430 U.S. at 671, n.40. In this case, the Supreme Judicial Court of Massachusetts has thus not only ignored this longstanding limitation on the applicability of the Eighth Amendment, but it has misused this Court's holding in *Estelle v. Gamble* to blur the carefully crafted distinction established by the Court to govern pre- and post-trial deprivations of liberty.

The respondent further argues that "[i]t would be anomalous indeed if *un*convicted prisoners had fewer rights and if the government had fewer obligations with respect to them" than convicted prisoners. Brief for Respondent in Opposition to Petition at 4. Yet this same argument was made and rejected in *Ingraham v. Wright*:

> [P]etitioners contend that extension of the prohibition against cruel punishments [to a noncustodial, schoolroom setting] is necessary lest we afford greater protection to criminals than school children. It would be anomalous, they say, if school children could be beaten without constitutional redress, while hardened criminals suffering the same beatings at the hands of their jailers might have a valid claim under the Eighth Amendment. Whatever force this logic may have in other settings, we find it an inadequate basis for wrenching the Eighth Amendment from its historical context. . . .

Id. at 668-69 (footnotes and citations omitted).[2]

In *Ingraham*, the Court went further to note that the children who were disciplined were not left without a remedy. Although an action based upon the provisions of the Eighth Amendment was foreclosed to them, tradi-

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[2] This is not to say, however, that *amicus* necessarily agrees with prior court decisions expanding the rights of criminals and prisoners, which, in some respects, is greater than that afforded to the victim and law-abiding citizens.

tional tort actions were still available. In this case, the remedy is more substantial than that in *Ingraham*. Under Massachusetts law, a patient is entitled to receive proper emergency medical treatment without regard to his or her financial status. *See* Mass. Gen. Laws Ann. c.111, § 70E (West 1982). Also, federal programs such as the Hill-Burton Act provide funding for hospitals such as MGH to ensure medical treatment for indigents. 42 U.S.C. § 291 *et seq.* *See also* Dougherty and Dougherty, *Moral Reconstruction on the Hospitals: A Legal and Philosophical Perspective on Patient Rights*, 14 Creighton L. Rev. 1409, 1410-1411 (1981). Significantly, there is no suggestion made by the hospital that they would in the future refuse to treat arrestees like Kivlin if the City did not pay the bills.

II. ASSUMING, *ARGUENDO*, THAT THE EIGHTH AMENDMENT IS APPLICABLE BEFORE CONVICTION, NO CRUEL AND UNUSUAL PUNISHMENT WAS INFLICTED IN THIS CASE.

Even if the Supreme Judicial Court were correct in deciding that the Eighth Amendment is applicable before conviction and is triggered the moment a person is in custody, 434 N.E.2d at 189, *amicus* submits that, in any event, no cruel and unusual punishment was inflicted on anyone in this case. The fact is that the suspected felon, Kivlin, was provided prompt and proper medical treatment. He was not deprived of any rights, including medical treatment. That fact should have ended the Eighth Amendment inquiry right there.

But since the lower court nevertheless ruled that Kivlin's Eighth Amendment rights were infringed, one must necessarily conclude that the cruel and unusual punishment allegedly inflicted was the mere refusal of the City of Revere to pay for Kivlin's medical services. *Amicus* submits that this does not amount to the infliction of cruel and unusual punishment.

An analysis of the Court's conclusion leads to some fairly absurd propositions. For example, the Court's conclusion suggests that Kivlin's "cruel and unusual punishment" was his knowledge that the City was not paying his medical bills. And since we do not even know that Kivlin was aware that the City refused to pay for his medical services, it is quite possible that the punishment being allegedly inflicted was so "cruel and unusual" that Kivlin was in fact not even aware he was being so punished!

When did this alleged punishment begin and when did it end? Under the lower court's analysis, one must conclude that it began the day that the City of Revere wrote to the hospital and exhibited a "deliberate indifference" by refusing to pay for Kivlin's medical treatment. The "punishment" thus appears to be a continuous one that will abate when the City either agrees to pay the bill or actually pays it. But since the bill was not sent by the hospital to the City until October 18, *after* Kivlin was released from the hospital and *after* being released from police custody on his personal recognizance, then the punishment—the City's refusal to pay—was *not* inflicted while Kivlin was in custody. And since the lower court's analysis for refusing to hold the City liable for the cost of Kivlin's *second* treatment by the hospital in October was because Kivlin was "no longer in custody of the Revere police," 434 N.E.2d at 189, that reasoning thus applies as well to his first stay.

In addition, the lower court's conclusion necessarily means that "cruel and unusual punishment" is inflicted regardless of the cost or who provides the medical services. Thus, if Kivlin had instead suffered a bruised arm from a police nightstick requiring nominal, though necessary, medical treatment, would the City have inflicted "cruel and unusual punishment" by refusing to pay a bill for $35.00 sent by the hospital? Or what if the City had a policy of paying only half of the bill; or 75 percent; or

95 percent? Or what if a citizen experienced in first aid had voluntarily provided care to the wounded suspect at the scene and sent a bill to the City for services rendered? Indeed, even if Kivlin or a third party had paid the bill in full, and even insisted on doing so, the lower court's conclusion would still mean that "cruel and unusual punishment" was inflicted by the mere fact that the taxpayers did *not* pay it. Presumably, under the court's decision, the city would even have to pay if the suspect in custody were wounded by his co-felon instead of the police.

As is readily evident, *amicus* submits that this decision makes for bad law.

III. THE TASK OF DETERMINING WHO SHOULD PAY FOR THE MEDICAL CARE AFFORDED A CRIMINAL SUSPECT IS A LEGISLATIVE, NOT A JUDICIAL, FUNCTION.

Amicus submits that the holding below constitutes a serious threat to the concept of "separation of powers" that has formed the basis of our system of government. This Court has recognized that certain activities are more appropriate to one branch of government than the other. *E.g., United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (executive branch in foreign affairs); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (judicial branch to review law); *Furman v. Georgia*, 408 U.S. 232 (1972) (legislative branch to make law and set policy). Although there may be some small overlapping of function, each branch must be careful not to encroach on the other's responsibility.

The Supreme Judicial Court's opinion in *amicus*' view manifests a "deliberate indifference" to the responsibilities and authority of the legislative branch of government. Although various local, state and federal laws are in place governing how scarce financial resources are to be allotted so as to pay for emergency medical care of indigents, the lower court wishes to construe the provi-

sions of the Eighth Amendment so as to make it possible for a court to decide how public funds are spent in these types of situations.

The Supreme Judicial Court wishes to have municipalities, in this case the City of Revere, be responsible for paying for the medical fees of injured felony suspects rather than the suspect himself or the hospital which provides the medical care. The solution it has devised may or may not be thought to be a wise one.[3] That is beside the point. What we have here is nothing less than an effort by a court *to legislate* a specific result which it deems to be proper.

The Eighth Amendment is a *limitation* on the powers of government. It prohibits the government from setting excessive bails and fines and imposing cruel or unusual punishment. It is judicial activism of the highest order to read into this limiting provision an *affirmative* duty to pay for the medical care of felony suspects and to determine the appropriate administrative institution or political entity that will henceforth be responsible for making these payments.

For this Court to uphold the intrusion into the legislative domain countenanced by the court below would be to sanction judicial usurpation of power of a magnitude rarely seen before. An affirmance of the decision would

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[3] *Amicus* believes that the lower court's decision is not in the public interest for many reasons, including the possibility that it will lead to an increase in criminal activity. Criminal activity, especially the kind that was afoot here, is an economic enterprise. To most criminals, the expected benefits from crime exceed the associated costs or risks. The risk of apprehension is small, the likelihood of a conviction smaller, and the probability of incarceration almost nonexistent. In short, "crime does pay." *See* North and Miller, THE ECONOMICS OF PUBLIC ISSUES 163 (1980).

What the lower court has done is to lower the cost a little further to the criminal of "doing business" by providing him with a form of publicly financed disability insurance for injuries suffered on the job.

send a dangerous signal to other judicially active judges and lawyers to further "judicialize" legislative problems under the guise of constitutional interpretation, until a point is reached where "government by judiciary" will become more entrenched than it already appears to be.

IV. A HOSPITAL WHICH HAS PROVIDED MEDICAL CARE TO A PERSON IN POLICE CUSTODY DOES NOT HAVE STANDING TO RAISE THAT PERSON'S CONSTITUTIONAL RIGHT WHEN THAT RIGHT HAS NOT BEEN THREATENED AND HE WOULD HAVE NO DIFFICULTY IN ASSERTING THE RIGHT HIMSELF.

An examination of the allegations made by respondent demonstrates that MGH lacks standing to maintain this suit. The lower court recognized that "there may be a question as to the hospital's standing to raise a claim under the Eighth Amendment in this context," *Massachusetts General Hospital v. City of Revere*, 434 N.E.2d at 188 n.7, but resolved the standing question by citing *Barrows v. Jackson*, 346 U.S. 249 (1953).

The resolution of the standing question by the lower court makes its discussion proper on appeal to this court. The Supreme Judicial Court of Massachusetts has ignored the clear principles of third party standing enunciated in *Barrows*.

In *Barrows v. Jackson*, this Court carved out an exception to the normal requirement of "injury" to establish standing in order to allow third party standing when "it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court." *Id.* at 257. As authority, *Barrows* can easily be distinguished from the instant case because *Barrows* represents a situation in which it was all but impossible for the true holder of the constitutional right in question to bring an action to assert that right.

But here, there is no showing that Kivlin was unable to enforce his Eighth Amendment rights. Assuming, *arguendo*, that the Eighth Amendment compels a municipality to reimburse a hospital for medical treatment provided to an injured suspect, there is no genuine obstacle, such as mootness, to deter him from asserting his right personally. Kivlin never chose to sue petitioners, ostensibly because he never felt his right to medical care was endangered nor was he given a bill for the services. Nor does it appear likely, considering current statutory safeguards, that future arrestees' right to treatment will be endangered.

To grant third party standing to respondent will serve only to "protect" its right to uncollected medical fees. Such a grant will also contradict the Court's own policies against third party standing in that a future injured suspect will enjoy his alleged right to medical care regardless of whether the hospital wins a future lawsuit for reimbursement of the costs of his medical care.

Amicus suggests that although Petitioner lacks standing, this Court should nevertheless rule against Petitioner on the merits since "the merits of this controversy present a pure question of law, with no need of a hearing for fact development, [and] because these merits are so clearly against the parties asserting jurisdiction." *Edwards v. Carter*, 580 F.2d 1055, 1056-57 (D.C. Cir. 1978), *cert. denied*, 436 U.S. 907 (1978). *See Adams v. Vance*, 570 F.2d 950, 954 (D.C. Cir. 1978); *Philbrook v. Glodgett*, 421 U.S. 707, 720 (1975). If the Court dismisses this case only on the issue of standing, it is likely that Kivlin or some other injured suspect will renew this litigation only to further clog up this Court's already overcrowded docket. Accordingly, the Court should reverse the lower court on the merits.

CONCLUSION

Amicus submits that the lower court seriously erred in ruling that the Eighth Amendment's proscription against the infliction of "cruel and unusual punishments" requires a municipality to pay for medical services rendered to a person injured while being apprehended for suspected criminal activity. The lower court also displayed a "deliberate indifference" to the role and authority of the legislative branches of our government by engaging in a prime example of judicial activism. And while the lower court also misconstrued the law of third party standing, *amicus* submits that this Court can and should summarily reverse on the merits without the need for scheduling oral argument.

Respectfully submitted,

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November 18, 1982

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(SHOW) PROCEEDINGS AND ORDERS DATE: 030283

CASE NBR 82-1-00063 CSX
SHORT TITLE City of Revere DOCKETED: Jul 12 1982
VERSUS MA General Hosp.

Date	Proceedings and Orders
Jul 12 1982	Petition for writ of certiorari filed.
Aug 12 1982	Brief of respondent MA General Hosp. in opposition filed.
Aug 12 1982	Brief amicus curiae of City of Boston filed.
Aug 18 1982	DISTRIBUTED. September 27, 1982
Oct 4 1982	Petition GRANTED.
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Nov 18 1982	Brief amicus curiae of City of Fitchburg, et al. filed.
Nov 18 1982	Brief amicus curiae of Washington Legal Foundation filed.
Nov 19 1982	Brief of petitioner City of Revere filed.
Nov 19 1982	Joint appendix filed.
Dec 20 1982	Brief amicus curiae of Mass. Hospital Assn., Inc. filed.
Dec 23 1982	Brief of respondent Massachusetts General Hospital filed.
Dec 23 1982	Brief amicus curiae of A.C.L.U., et al. filed.
Jan 3 1983	Record filed.
Jan 3 1983	Certified copy of original record filed.

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PROCEEDINGS AND ORDERS DATE: 030283

CASE NBR 82-1-00063 CSX
SHORT TITLE City of Revere DOCKETED: Jul 12 1982
VERSUS MA General Hosp.

Date	Proceedings and Orders
Jan 3 1983	CIRCULATED.
Jan 19 1983	SET FOR ARGUMENT. Monday, February 28, 1983. (4th case)
Feb 19 1983	Reply brief of petitioner City of Revere filed.
Feb 28 1983	ARGUED.